97

CASES DETERMINED

IN THE

ST. LOUIS COURT OF APPEALS

OF THE

STATE OF MISSOURI

FROM JUNE 10, 1884, TO MARCH 11, 1885.

REPORTED BY

A. MOORE BERRY,

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JUDGES

OF THE

ST. LOUIS COURT OF APPEALS

DURING THE TIME OF THESE REPORTS.

HON. EDWARD A. LEWIS, *Presiding Judge.*

HON. ROBERT A. BAKEWELL,* }
HON. SEYMOUR D. THOMPSON, } *Judges.*
HON. RODERICK E. ROMBAUER,* }

JOHN LEWIS . . . . *Clerk.*
A. MOORE BERRY . . . . *Reporter.*

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* At the general election held in November, 1884, Judge Rombauer was elected to succeed Judge Bakewell, whose term of office expired January 1, 1885.

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CASES DETERMINED

IN THE

ST. LOUIS COURT OF APPEALS,

MARCH TERM, 1884.

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ST. LOUIS DAIRY COMPANY, Respondent, *v.* JULIUS SAUER, Appellant.

June 10, 1884.

1. **EXECUTION — INDEMNITY BONDS — SHERIFFS — CLAIMS OF THIRD PERSONS — REPLEVIN.** — A claim made by one whose property has been levied upon under an execution against another, which will deprive the claimant of the right to replevy the property and confine him to his remedy on the bond, must be made in conformity to the statute.
2. —— The claimant will not be deprived of his right to replevy his property unless the officer shall have taken a good indemnification bond.
3. —— An indemnity bond taken under the act of March 3, 1855, if not taken in the name of the state will not protect the officer nor establish his defence in an action of replevin for goods seized by him.
4. —— The amendment of that act, passed March 14, 1859, does not repeal the original provisions of the act as to the conditions of the bond, nor the provision that the bond shall be made payable to the state.
5. —— An instrument purporting to be under seal, but which is signed by an agent whose authority is not under seal, is not a good statutory or common-law bond.

APPEAL from the St. Louis Circuit Court, THAYER, J.

Affirmed.

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B. SCHNURMACHER and FINKELNBURG & RASSIEUR, for the appellant: The main purpose of the act is to protect the officer from litigation, upon his procuring from the plaintiff in the execution or attachment an indemnity bond upon which the claimant may bring suit. — *The State to use* v. *Lentzinger*, 41 Mo. 498; *The State* v. *Platt*, 52 Mo. 466; Act of 1855 and Amendatory Act of 1859, 2 Rev. Stats. 1554 (Appendix). The claimant may bring suit upon the bond in question, although it is made payable to the officer instead of the state. — *The State to use* v. *Thomas*, 17 Mo. 503; *The State to use* v. *Donnelly*, 9 Mo. App. 520.

A. & J. F. LEE, JR., for the respondent: This act of March 3, 1855, making compliance with its provisions a bar to a plaintiff's recovery of his own property being derogatory of common right and a statute prescribing a form of procedure must be strictly construed. — Sedgwick on the Construction of Statutory and Constitutional Law, 267 and 275; Co. Inst., 282b, L. 3, S. 485; *Crayton* v. *Munger*, 11 Texas, 234. A claim, to be of avail, must be in the statutory form. — *Bradley* v. *Holloway*, 28 Mo. 150.

BAKEWELL, J., delivered the opinion of the court.

This was an action of replevin for a horse, wagon, and harness. The plaintiff having made the affidavit and given the bond required by law, the property was delivered to him by order of court. The defendant's answer sets up, that he is a constable of the city of St. Louis, and had levied upon the property as the property of defendant in a certain execution in his hands issued upon a judgment of a justice of the peace against one Cabanné; that the plaintiff in this action claimed the property under the provisions of the sheriff and marshal's act of 1855; whereupon the plaintiff in the action before the justice, gave to this defendant a good and sufficient indemnification bond, as provided by that act. The reply is a general denial. The cause was tried without a jury, and there was a finding and

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judgment for nominal damages, and that plaintiff retain the property.

The claim offered in evidence seems to be in the language of the statute. The claim, after its address to the constable, proceeds thus: "Sir: Take notice that I, the St. Louis Dairy Co., claim," etc. It concludes thus: "St. Louis Dairy Company, per J. C. Cabanné, Sec. Sworn to and subscribed before me this 15th day of June, 1883. Charles A. Davis, Notary Public."

The bond, which was offered in evidence by defendant and excluded by the court, is as follows: "We, Frederick A. Schroeder and Isidore M. Bon, composing the firm of Schroeder & Bon, by Jacob Rowak as principal, and B. Womer and Joseph Schlange as securities, are held and firmly bound unto Julius Sauer in the sum of six hundred dollars, to the payment whereof well and truly to be made, we bind ourselves, our heirs, executors, and administrators jointly and severally, firmly by these presents. Sealed with our seals," etc. The condition under written, is that of the usual indemnification bond prescribed by the statute. The bond is signed as follows: "F. A. Schroeder & I. M. Bon, composing firm of Schroeder & Bon, seal. By J. Rowak, seal. B. Womer, seal. Joseph Schlange, seal."

The testimony as to the execution of the bond is that of Jacob Rowak, as follows: "I know the firm of Schroeder & Bon. They do business in New York City. Some time last May they telegraphed me about S. C. Cabanné's note going to protest, and directed me to act to the best of my knowledge in their case against him, with the advice of my attorney. They had no other agent here at the time. I informed them of my having given the bond, and who the bondsmen were, and they did not dissent."

It is claimed by respondent that the evidence did not establish the defence set up: 1. Because the claim shown is insufficient. 2. Because no authority appears in Rowak to execute the bond in the name of the principals. 3. Be-

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cause even if good as a common-law bond, the bond does not comply with the statute.

One whose property is seized on execution directed against another, need not proceed to claim under the provisions of the special act of the 3d of March, 1855. He may, if he chooses, begin an action of replevin, disregarding his remedy under the act. If, however, he proceeds under the act, and makes a valid claim, and the officer in accordance with the act receives a sufficient indemnification bond from the plaintiff in the execution, then the claimant has no remedy against the officer, but must resort to his action on the bond. *Bradley* v. *Holloway*, 28 Mo. 150.

The claim which will have the effect of confining the claimant to the remedy on the bond, and which will deprive him of his right to replevy his property, must be a claim in conformity to the statute. There can be no legal difference between making no claim, and making a claim which is not in conformity with the statute, and so it is held in the case just cited. Whether the claim in evidence in this case can be regarded as verified by the affidavit of the claimant or of the agent of the claimant, we need not determine.

The statute requires a bond. The term bond imports an obligation in writing under seal. There can not be a bond without seal; and an instrument which speaks of a seal, but which has no seal or scroll, is held in Missouri not to be a specialty, and to be an instrument that can not be sued upon as a bond. *The State ex rel.* v. *Clay Co.*, 46 Mo. 231; *The State ex rel.* v. *Thompson*, 49 Mo. 188. It is well settled, wherever the distinction between a specialty and a simple contract is preserved, according to the common-law doctrine on the subject and the recognized principles of agency, that an authority to an agent to execute an instrument under seal, whenever this is not done in the actual presence of the principal, must itself, in all cases, be under seal. *Heirs, etc.*, v. *McCullough*, 1. M. L. 69; *Hibblewhite* v.

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McMorine, 6 Mees. & W. 200. And a subsequent ratification must also be under seal, on the same reasoning and the same authority of the common-law decisions. *Wells* v. *Evans*, 20 Wend. 251. However, a court of equity might undoubtedly compel the principal to confirm and give validity to the deed. *McNaughton* v. *Partridge*, 11 Ohio, 223. It is true that the courts in modern times have abated something of their former respect for the seal; and it would be difficult to say now with precision what is the general American doctrine on the subject. In some states a sealed instrument has perhaps ceased to be anything more than a simple contract. But this can not be said of Missouri, where it is expressly held, and in recent times, that, however a bond may vary from the statute, and be a good common-law bond, it can neither be a statutory nor a common-law bond without the seal; and that the sureties on an attachment bond will not be liable thereon where the instrument is unsealed. "We have been very liberal," says Judge Bliss in *The State ex rel.* v. *Thompson* (*supra*), "as to what constitutes a common-law seal; but have never dispensed with a seal in bonds and deeds, except as the statute substitutes a scroll in lieu thereof. It might be very well, as has been done in some states, to dispense with seals altogether, but courts can not so change the law, and those who desire the change must look to the law-making power."

As, then, Schroeder and Brothers were not present, and no member of the firm was present, when Rowak signed the bond, in view of the general rule that an agent, unless authorized under seal to do so, can not execute a specialty for another in his absence (Story on Ag. sects. 49, 242) there seems to be no sufficient evidence of any authority on the part of Rowak to execute the bond for them, and the bond is not shown to be a sufficient bond. The act provides that, on receiving the claim, the officer may demand a bond of the plaintiff or his agent. This does not imply any

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authority to the agent of the plaintiff to execute a sealed instrument in the name of his principal without having a power of attorney under seal authorizing him to do so. It is suggested by counsel for appellant that, if the claimant had brought suit upon the bond, and failed in his action on the ground that it appeared that it was not executed by one having authority to bind the obligor, then he might have an action against the constable, and that until it has appeared in such an action that the bond is invalid for this cause, this defect in the bond can not be taken advantage of by plaintiff. The defect of authority to execute the bond appears, however, in this case, from the testimony introduced by defendant, so that he does not make out a *prima facie* case for his defence. But, even if the bond were good as a common-law bond, it does not comply with the statute, which requires that it shall be made payable to the state of Missouri. The act requires (sect. 4) that the claimant, if he does not elect to proceed by motion in the circuit court, but chooses to sue upon the bond, shall sue in the name of the state to his own use. It does not appear how he could sue in the name of the state upon a bond not payable to the state; and we do not perceive how the claimant can be compelled to take, instead of his property, a bond which is not given in substantial compliance with the statute. The bond, if it complies with the statute, has the effect of depriving the claimant of the right, which he would otherwise have, to proceed directly against the officer to recover his specific property. It is true that, where the claimant has made claim under the statute, he has thereby declared his willingness to accept the value of his property in damages, and to discharge the sheriff from liability; but this is only upon condition that the sheriff on his part will take, and return with the execution, the bond prescribed by the statute. He makes his claim hoping to avoid a lawsuit and to have his property at once. He takes the risk thus of losing his specific property. The

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sheriff may obtain and return a sufficient bond. If so, the claimant may be remitted to his claim for damages, whatever value the specific property may have in his eyes. But, if the officer can not, or does not, return a sufficient bond, the claimant may still have his remedy by replevin. The practice has undoubtedly always been to take these bonds in the name of the state, and the law requires that this shall be done.

The amendment of March 14, 1859, to the original act provides (sect. 2, Gottschalk's St. Louis County Laws, p. 563) that "any indemnification bond taken, as aforesaid, with good and sufficient security, shall be deemed an indemnification bond within the meaning of the act to which this act is amendatory." But this language, evidently, is not intended to repeal the provision of section 2 of the original act, that the bond shall be payable to the state and conditioned as the law requires. It obviously means that the bonds spoken of in the amended act, though by the amendment more than one bond may be taken, and the amount of the bond may be fixed by appraisement at a sum not based upon the value stated in the claim, and though the condition of the bond is made to conform, not to the original law, but to the execution act, are nevertheless to be considered as indemnification bonds under the original act and subject to its provisions.

We held, in *The State to use* v. *Donnelly* (9 Mo. App. 519), that a bond, otherwise in strict conformity to the statute, would protect the officer, though it contains a clause indemnifying the sheriff, which might be rejected as surplusage. The supreme court, in *The State to use* v. *Leutzinger* (41 Mo. 498), held that a bond taken to secure jointly several claimants was sufficient to protect the officer, since each claimant could have his several action on the bond. And Judge Wagner says in that opinion, that a bond that does not literally follow the statute will protect the officer, if it substantially follows the law. We are inclined to think that a bond not

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taken to the state of Missouri is not a substantial compliance with the law, since the act provides that the claimant who sues upon the bond shall bring his action in the name of the state.

The law should undoubtedly be construed with some strictness; but it is also clear, both on reason and authority, that the officer is not to be deprived of the protection which the act was intended to extend to him where there has been a substantial compliance with its provisions. When sued in trespass, however, if he would set up this act for his protection, he must bring himself within its provisions. This he does not do by introducing a bond of which the state is not the obligee, and which is signed in the name of the principal by an agent, who shows affirmatively that he had nothing but parol authority to sign the bond.

There was no declaration of law asked or given in the court below. It is admitted that plaintiff made out his *prima facie* case. As we think, for the reasons given, that defendant failed in making out his defence, we ought to affirm the judgment. It is so ordered. All the judges concur.

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THE STATE OF MISSOURI EX REL. H. HORSKOTTLE, Appellant, *v.* BOARD OF HEALTH OF THE CITY OF ST. LOUIS, Respondent.

June 10, 1884.

1. NUISANCE — ORDINANCES. — The passage of an ordinance that no brick-kiln shall thereafter be erected within three hundred yards of a dwelling-house, does not authorize the operating of a brick-kiln after it becomes a nuisance.

2. —— A legislative authority to carry on the work of operating a brick-kiln is not a defence to an action for a nuisance created in carrying on the work.

3. —— A brick kiln is not a nuisance *per se*, but may become a nuisance when streets are laid out and dwelling-houses are erected in the immediate vicinity.

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4. —— It is immaterial that a brick-kiln which has become a nuisance was established before there were any dwelling-houses in its vicinity.

5. —— RES JUDICATA. — A prosecution for a violation of a city ordinance in erecting a brick-kiln within three hundred feet of a residence, does not involve the question of a nuisance and does not make that question *res judicata* as to the city.

APPEAL from the St. Louis Circuit Court, THAYER, J. *Affirmed.*

G. M. STEWART, for the appellant: That which has legslative sanction can not be a public nuisance. — *Crittenden* v. *Wilson*, 5 Cow. 165; *Fletcher*, v. *Railway Co.*, 25 Wend. 462; *The State* v. *Western, etc., Co.*, 2 Johns. 283; *People* v. *Platt*, 17 Johns. 195; Wood on Nuisances, sect. 757, and cases cited. There can be no question of the power to license brick-kilns. They are not a nuisance *per se.* — Wood on Nuisances, sect. 519, and cases cited. It would seem to be immaterial, however, if it were a nuisance *per se.* — *The State* v. *Clark*, 54 Mo. 17. The question is, can the respondent deprive us of the use of property which the charter and the city has given us the right to use? If not, then the respondent is proceeding without authority or warrant of law, and the writ should issue. — *Thomas* v. *Mead*, 36 Mo. 232; *Howard* v. *Pierce*, 38 Mo. 296; *Trainer* v. *Porter*, 45 Mo. 336; *The People* v. *Works*, 7 Wend. 486; *The State ex rel. Jones* v. *Laughlin*, 73 Mo. 443; *The State ex rel.* v. *Lewis*, 76 Mo. 370; *The State* v. *Wilcox*, 24 Minn. 143.

LEVERETT BELL, for the respondent.

BAKEWELL, J., delivered the opinion of the court.

The petition of relator contains the following allegations: Relator owns a lot, 2310 and 2312 Madison Street, in the city of St. Louis, on which he has continually operated since 1874 a brick-yard and brick-kiln; these have been constantly operated in the same manner as all brick-kilns then and since operated in said city are and have been operated. On September 4, 1883, the health commissioner of

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St. Louis reported this brick-kiln of relator to the board of health of that city as a nuisance detrimental to public health, and cited relator to appear before said board on September 13, to show why the same should not be abated. Relator, in obedience to this summons, appeared and demurred to the jurisdiction, on the grounds: 1. That the brick-kiln was established before the then existing city charter, and before the passage of ordinances respecting the establishment of brick-kilns in St. Louis, wherefore relator has a license to operate his kiln. 2. The second district police court of St. Louis, on complaint of the chief of police against relator for maintaining this brick-kiln, on hearing, adjudged in favor of relator's right to maintain this kiln. This demurrer was overruled by the board of health, which then proceeded to declare the brick-yard and brick-kiln of relator a public nuisance detrimental to the public health, and now proposes to proceed to take steps to abate the same. Section 34 of article 3 of the city charter of 1876, provides that no brick-kiln shall be located within 300 feet of any dwelling-house built or inhabited before such location, without the consent in writing of the owner and occupant of every such house; and that the municipal assembly shall provide by ordinance for the effectual enforcement of this section. Afterwards, on March 29, 1881, sections 16 and 17 of article 17, chapter 14, of the revised ordinances of St. Louis were enacted, by which it is provided that "hereafter no brick-kiln shall be located within 300 feet of any dwelling-house built and inhabited before such location, without the consent in writing of the owner and occupant of every such house;" the violation of the provision to be a misdemeanor punishable by fine; and, also, that any person operating a brick-kiln within 300 feet of any dwelling, without the consent in writing of the owner and occupant, shall be fined not less than $25 for every day he so operates such kiln. These ordinances are still in force; and relator was prosecuted under them in the

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police court, which court on September 18, 1883, found relator not guilty, on the ground that his kiln was located and operated before the charter and ordinances aforesaid were adopted. This judgment is in force; and relator claims that it is conclusive against the city as to relator's right to operate his kiln. Relator prays for a writ requiring the board of health to show cause why a writ of prohibition should not issue commanding it to desist from further action in the premises and from executing its order condemning relator's brick-kiln.

To the alternative writ issued on this petition, the respondent made answer: That all the proceedings in question before the board of health were ended on the 8th of October, twenty days before relator's application herein; that on said day, the board of health, by virtue of the charter and ordinances above set out, after hearing evidence in the matter, condemned the kiln in question as a nuisance detrimental to public health. The particulars of these proceedings, and the notice to relator, are set out, and it is alleged that they were in conformity to law; that the relator appeared and defended by counsel, and that these proceedings were within the jurisdiction of the board of health. Respondent puts in issue the alleged judgment of the police court; but says that it had no operation to oust the jurisdiction of the board of health in the premises.

Relator demurred to this return, on the ground that it states no defence. The demurrer was overruled, and the information was dismissed.

We see nothing in the facts admitted by the pleadings in this case which tend to show that the board of health exceeded its jurisdiction in condemning this brick-kiln as a nuisance.

We see nothing in the language of the charter and ordinances set forth by relator which can be taken to be a license to continue to operate, within the city of St. Louis, all brick-kilns in operation at the time the charter was

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adopted, no matter what may be the changes in the neighborhood in which the kiln may exist. A brick-kiln is not *per se* a nuisance. *Huckenstein's Appeal*, 70 Pa. St. 106. "There is no case," says Mr. Wood (Nuis., sect. 535), "in which brick-burning has ever been held to be a public nuisance; but there is no doubt that it would be so, when carried on so near to a city or town, or a public street, that the public were thereby materially annoyed and injured; but, being a business that is generally conducted away from public places, it has never come under the purview of the criminal courts. This, as well as any other business producing smoke and noxious vapors, may lawfully be conducted so far from public places and human habitations that the smoke and vapors are so diffused and attenuated before they reach such places, as to produce no material injury or annoyance."

A nuisance is not the necessary result of burning brick; and where a nuisance is not the necessary result of the work authorized, legislative authority to create a nuisance will not be inferred from any license or authority to carry on the work, and legislative authority merely to carry on the work will not be a valid defence to a public prosecution or to a private action for a nuisance created in carrying it on. What was not contemplated in a grant, is not authorized by it. Thus, legislative authority to construct a canal, or to dam a stream, will not protect the grantee or licensee from nuisances created by the stagnancy of the water occasioned by the dam. *Clark v. Mayer, etc.*, 13 Barb. 32; *The People* v. *Gas-Light Co.*, 64 Barb. 55; *Reg.* v. *Bradford N. Co.*, 6 B. & S. 631.

Even what is a nuisance *per se* may be carried on in a remote locality so as to be no common annoyance to the public. And, on the other hand, what is not a nuisance *per se*, such a trade as has been harmlessly and beneficially carried on for years in a particular locality, may become a public nuisance without any

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change in the way in which it is conducted, by reason of public streets being laid out near it, or numerous dwellings erected in its vicinity, so that it becomes a serious annoyance. The business of burning brick is a lawful and necessary business; the question as to whether it is a nuisance or not is to be determined largely by the surroundings of the brick-kiln. It has been held a nuisance when within three hundred and fifty yards of a residence (*Beadmore* v. *Treadwell*, 31 L. J. (N. S.) 873), and *prima facie* a nuisance within one hundred yards of a dwelling. *Bassham* v. *Hall*, 22 L. T. 116. And it was held no answer to say the business had been carried in the same place for seventeen years. *Bamford* v. *Tumley*, 2 B. & S. (Q. B.) 62. Where a brick-yard is a nuisance, it is immaterial that it was used before plaintiffs bought their lands or built their houses (*Brady* v. *Weeks*, 3 Barb. 156), "because one can not place upon his land anything which the law would pronounce a nuisance, and thus compel his neighbor to leave his land vacant, or to use it only in such a way as the neighboring nuisance will allow," as is said by Earl, J., in *Campbell* v. *Seaman* (63 N. Y. 584). In this last case the defendant claimed a prescriptive right to burn brick on his land; and the referee found that the premises of defendant had been known and used as a brick-yard for over twenty-five years, though not so used continuously during the entire period, but it was held that the finding warranted no such prescription, and that plaintiff's right to an injunction was not affected by the fact that the brick-yard was used before plaintiff purchased.

We see nothing in the charter and ordinances set up by relator which deprives the board of health of its jurisdiction to declare his brick-kiln a nuisance, and to abate it as such. The provisions cited prohibit the location of brick-kilns within three hundred yards of a dwelling without a written consent; but they neither say nor imply that existing brick-kilns within the limits of the city — embracing, as

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those limits do, immense tracts of suburban and country property — are to be allowed to remain, no matter what changes may take place in the localities in which they exist, and whether they become nuisances or not. The city is authorized by its charter "to declare, prevent and abate nuisances." 2 Rev. Stats., p. 1586; art. III., sect. 26, par. 69. The method pursued by the board of health and the health commissioner seems to be that provided by law (chart., art. XII., sect. 6), and we see no reason why they should be prohibited from carrying it into effect.

The conviction in the police court is manifestly not any adjudication of the question before the board of health. The relator was there tried for operating a brick-kiln without consent of his neighbors, in violation of the ordinance. In such case the question of nuisance does not properly arise at all.

We think that the circuit court properly denied the writ, and its judgment should be affirmed. It is so ordered. All the judges concur.

EX PARTE A. C. BOWLER.

June 10, 1884.

HABEAS CORPUS — ORDINANCES — PRACTICE. — Under an application for the discharge of a prisoner, under a writ of *habeas corpus*, on the sole ground of the unconstitutionality of the ordinance for a violation of which he is held for trial, an appellate court will not pass upon the validity of the ordinance, but will remand the prisoner.

APPLICATION for a writ of *habeas corpus*.

Prisoner remanded.

TAYLOR & POLLARD, for the petitioner.

BAKEWELL, J., delivered the opinion of the court.

The petition alleges that Bowler is unlawfully restrained of his liberty by the chief of police of the city of St. Louis,

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at the St. Louis jail, and that the illegality of the restraint consists in the fact that this is being done by virtue of city ordinance 12,473, the only accusation against the petitioner being, that on June 3, 1883, he engaged in the business of a solicitor or canvasser of sewing machines in said city without a license, in violation of the fifteenth sub-division of section —— of said ordinance, which requires every such solicitor to pay a city license of $25.00. The petitioner alleges that said subdivision conflicts, for reasons stated in the petition, with various provisions of the constitution of the United States and of the constitution of the state of Missouri, which are referred to in the petition.

The return of the chief of police sets forth that by the provisions of the city ordinance, copies of which are filed and made part of the return, no one is permitted to carry on the business of a sewing machine agent in the city of St. Louis without a license from the city collector; that, under the instructions of the police commissioners and of respondent, to take into custody all persons violating this ordinance, the petitioner was, at the date named in his petition, arrested by a member of the police force of the city of St. Louis, for carrying on in said city the business of a sewing machine agent without a license. The return further sets out the ordinance 11,668, chapter 30, establishing the police courts of the city of St. Louis, which is made part of the return, and which establishes police courts in St. Louis, giving them original jurisdiction for the recovery of fines, forfeitures, or penalties imposed for violation of any city ordinance, and provides that where any one is arrested by the police for violation of city ordinance, no warrant shall be necessary, but he shall be tried on the written report of the chief of police, stating the offence committed. The return further shows that petitioner is held upon the written report of the chief of police to the first district police court of the city of St. Louis, dated June 4, 1884, which is made part of the return, and which, in the

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usual form, charges petitioner with violation of city ordinances, as set out in the petition and return, in this, that he did, in the city of St. Louis, on June 3, 1884, carry on the business of a sewing machine agent without having first obtained a license from the city collector, etc.

The petitioner moves to quash this return; and in support of his motion, he urges various reasons why the ordinance whose provisions he is charged with violating ought to be held invalid, as violating provisions both of the state constitution and of the constitution of the United States.

The statute provides (Rev. Stats., sect. 2650) that: "If it appear that the prisoner is in custody by virtue of process from any court legally constituted, or issued by any officer in the service of judicial proceedings before him, such prisoner can only be discharged," in one of the six cases enumerated in the section. The supreme court held *In re Harris* (47 Mo. 164), that this provision precludes any examination, in a *habeas corpus* proceeding, into the constitutionality of the law for the violation of which the prisoner is held, under legal process, by a court having jurisdiction of the person and the offence, and in custody of the proper officer.

It appears from the ordinance creating the police courts of St. Louis (Rev. Ord. 1881, sect. 19), various provisions of which have been frequently considered by this court on application for the discharge of prisoners (*Ex parte Kiburg*, 10 Mo. App. 442; *Ex parte Washington, Ibid.* 495, 592), that no summons or warrant need be issued against any person lawfully arrested by any officer of the city police, but a trial shall be had upon the written report of the chief of police, and the person so arrested may require a written statement of the nature of the offence with which he is charged, and the ordinance under which the charge is brought. A police officer may lawfully arrest for a misdemeanor committed in his presence. *Taaffe* v. *Slevin*, 11 Mo. App. 507. It will not be presumed by us that the

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arrest of the prisoner by a police officer was illegal. In the absence of anything to the contrary, the presumption is that the original arrest was made under circumstances which warranted the officer in making an arrest for a misdemeanor.

As the arrest, therefore, appears, from the face of the return, to be *prima facie* a legal arrest, the motion to quash ought to be overruled, unless we are to go into the question which the petitioner seeks by this proceeding to raise, as to the validity of the ordinance that he is charged with violating.

If the prisoner were in custody by virtue of process from a court, or issued by an officer in the service of judicial proceedings before him, the case would be precisely that presented by *Ex parte Harris* (*supra*), and there could be no question that we ought not, in this proceeding, to examine into the validity of the law constituting the offence for which the prisoner was arrested. But though the prisoner was arrested by an officer having power to arrest for a misdemeanor, and though on such an arrest he might lawfully be held for trial, he is not in custody by virtue of "process from any court, or issued by an officer in the service of judicial proceedings before him." The case does not, therefore, come within the precise language of the *habeas corpus* act. We think, however, that it comes within the equity of the statutory provision; and it is clearly within the reasoning of the supreme court in *Ex parte Harris*. The prisoner, in this case, as in that, "is in custody of the proper officer, and by virtue of a provision of the law." The prisoner, in this case, as in that, "can have his trial, and if he is dissatisfied with the judgment, and desires to test the validity of the law, the courts are open to him, as they are to all other persons charged with the violation of the laws of the land." "Admit this proceeding," says Judge Wagner, in the case just cited, "and every person charged with committing an offence of every kind and

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description whatsoever, instead of standing his trial, and litigating the matter as the law directs, can come here and ask our advice as to the validity of the law under which he is arraigned. Such a precedent can not be established, and the legislature clearly saw the impolicy of the proceeding when it placed a prohibition upon it." This language clearly indicates the view of the supreme court that *habeas corpus* is not the proceeding in which the constitutionality of penal enactments can be litigated by those charged with their violation. The fact that the prisoner in one case was charged with violating a general law of the state, and in the other with the violation of a municipal ordinance, furnishes no ground for distinction in favor of the prisoner. On the contrary, the hardship of a refusal to examine into the validity of the law on an application by *habeas corpus* for a discharge of the prisoner, seems to be less where the penalty is a fine than where the punishment is more severe.

The presumption is in favor of the power of the legislative body to pass the law which it has enacted. The courts will not declare the law void on a mere doubt, nor without the most careful consideration. The refusal by the supreme court to entertain the question of the constitutionality of a law for the violation of which the prisoner was held, on an application where the petitioner was imprisoned under an arrest by the sheriff on an information for violating a penal statute, ought to have very great weight with us, even if the case is not of controlling authority; for the reason that in the case of the supreme court, if it should examine into the validity of the violated law before a trial of the prisoner, it speaks as the court of last resort, which must finally determine the question, but, whilst our judgment against the law would discharge the prisoner without appeal, it is not to this court that it belongs, under the organic law of the state, finally to settle the question as to the validity of the law. If we should declare void the ordinance which we are now asked to consider, in every

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case of arrest for its violation, application to this court, or to any tribunal within the jurisdiction of this court, for a writ to discharge the prisoner before trial, would result in his discharge, and the ordinance would be nullified without any opportunity on the part of the city to test its validity by an appeal to the supreme court.

We are referred by counsel for the prisoner to *Ex parte Slater* (72 Mo. 102). That case is not in point. The prisoner was held under an indictment for felony, found in a country other than that in which the offense was committed, under a statute authorizing this to be done, and which the supreme court, on an application by *habeas corpus* for the discharge of the prisoner, found to be unconstitutional and void. The jurisdiction of the court had been exceeded as to place, which is one of the six cases expressly enumerated in the *habeas corpus* act (Rev. Stats., sect. 2650), in which the prisoner is to be discharged though "in custody in virtue of process by a court or issued by an officer in the service of judicial proceedings before him." The court was bound to decide the question of jurisdiction, and, in doing so, must necessarily pass upon the validity of the law under which the jurisdiction to issue the process was claimed. There was no question whatever of examining, at the instance of the prisoner, under the *habeas corpus* act, into the validity of the penal statute with a violation of which the prisoner was charged. We are also referred to *Ex parte Bethurum* (66 Mo. 545). That was a case of excessive sentence, in which the trial court had exceeded its jurisdiction as to matter, which is also a case expressly enumerated in the above cited section of the *habeas corpus* act, as one in which the prisoner is to be discharged by the writ. The supreme court necessarily examined into the validity of the law which professed to give it authority to correct on *habeas corpus* an erroneous sentence; and it held the law valid, corrected the sentence, and remanded the prisoner, without in any way impairing the authority of *Ex parte*

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Harris, or impeaching the reasoning in that case, or anything said in that opinion.

The question that we have to consider is, not whether the court, on *habeas corpus*, should look into the validity of the law conferring power upon the court that issues the writ, or on the officer that executes the process under which the prisoner is held, but whether on *habeas corpus* the court should examine the question of the constitutionality of the law which the prisoner is arrested for disobeying.

We know that questions involving the constitutionality of acts of the legislature and of acts of congress which the prisoner is charged with violating, as well as questions involving the jurisdiction of the highest courts, state and federal, and of the validity of their process, have been decided by courts of inferior jurisdiction and by individual judges of these courts, on application under this writ for a discharge of the prisoner. We are aware that it has been held in some of the states that it is the duty of any judge, on a hearing on *habeas corpus*, to decide such questions. In some of the states provision is made for an appeal from the order remanding the prisoner. Where this is so, it may sometimes be well that questions of this sort, requiring the most serious consideration by the ablest and most authoritative expounders of the law, should be passed upon by the lower courts and by their individual judges sitting apart. In Missouri a judge of a county court has as ample power to grant the writ and order a discharge under it, as has the supreme court of the state; and from the decision of the county judge there is no appeal. This court has no more power in the matter than has any judge of a county court, though such judges need not be lawyers and may be quite ignorant of law. No appeal lies from our decision, and no appeal would lie from the decision of the lay judge, whether remanding or discharging the prisoner; and, for the reasons stated, we are of the opinion that it was not the intention of the legislature that the writ should be used for the pur-

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pose of enabling a person accused of crime or of violating any penal enactment, to obtain the opinion of the judges of the appellate court, in advance of a trial, as to the validity of the law which he is accused of violating. If the prisoner has chosen to determine for himself that the enactment is, for any reason, void and, on the chance of this, has ventured to violate it, there is surely no hardship in saying to him that he shall take the consequences and shall stand his trial in the usual way. Such a course is conducive to good order and to a proper respect for law.

We are referred to *Ex parte Siebold* (100 U. S. 371). The case is not of binding authority upon us. Nor do we think it in point. The court, there, in a case where it would have had no power to review the judgment by which the prisoner was convicted, had the act been constitutional under which the conviction was had, exercised by the writ of *habeas corpus*, its appellate jurisdiction in the interest of personal liberty. *Ex parte Watkins*, 32 U. S. 568; *Ex parte Kaine*, 55 U. S. 117; *Ex parte Wells*, 59 U. S. 307. But it will not, we suppose, be contended that we exercise appellate jurisdiction by this writ. We exercise our original jurisdiction in entertaining an application of this nature.

If the constitutionality of the law which a prisoner is charged with violating is thus to be examined in advance of a trial, and by a judge of an intermediate appellate court sitting apart, as must frequently be the case if the precedent is now set of granting the writ for such a purpose, there will be danger, owing to the exigencies of the writ, of such important questions being decided without being regularly discussed or maturely considered. "Such a decision of matters in advance would become a new, and perhaps a prolific source of embarrassment, from the difficulty of getting rid of immature conclusions, or the sanction of them with the view of maintaining consistency," to use the language of an eminent judge in adverting to a similar danger.

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And, as I have referred to *Ex parte Wells* (*supra*), I can not better close than by adopting the language of Judge Curtis in his dissenting opinion in that case: "This great remedial writ of *habeas corpus*, so efficacious and prompt in its action, and so justly valued in our country, ought not to be made an instrument to unsettle the lines of jurisdiction and to produce conflict and disorder. If the true sphere of its action is suffered to become confused and indistinct, serious consequences, affecting the administration of the criminal laws, may follow. For these reasons, though sensible of the bias which I suppose every one has for this process, I have felt constrained to examine with care the question of our right to determine, on such an application, before trial, the validity of the law for the alleged violation of which the prisoner is held.

The motion to quash the return will be overruled. As counsel for prisoner stated on the hearing that the motion to quash raised every question going to the merits of the application, and that he did not desire to plead over, in case it was overruled, it follows that the prisoner should be now remanded. It is so ordered. All the judges concur.

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D. D. BURNS ET AL., Appellants, *v.* H. BANGERT ET AL., Respondents.

June 10, 1884.

1. JUDGMENT — ASSIGNMENT. — The assignee of a judgment takes the assignor's right to enforce the judgment by supplemental proceedings.
2. EQUITY — INFANTS — PARTIES. — Interests of minor children in property the sale of which is sought to be set aside as fraudulent, can not be affected by a decree in a suit to which they are not parties.
3. —— PRACTICE. — If minor children are not necessary parties to an action on the plaintiff's theory of the case, his bill should not be dismissed because he has not made them parties.

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4. —— HUSBAND AND WIFE — REDUCTION TO POSSESSION. — The fact that money which is the joint earnings, by labor on a farm, of a husband and wife and her children, is kept in her possession, does not rebut the presumption that the title thereto is in the husband.

5. —— Personal property so under the control of the husband that he may at any time take manual possession of it, is such a reduction to possession as gives him the title.

6. —— USES AND TRUSTS. — A husband who, by marriage, acquired the absolute right to personal property in possession, can not, by mere loose talk, be made a trustee of the property for his wife's use.

APPEAL from the St. Louis County Circuit Court, EDWARDS, J.

Reversed and judgment.

L. S. METCALFE, JR., and FRANKLIN FERRISS, for the appellants: Evidence to create a resulting trust must be clear, strong, and unequivocal. Mere preponderance will not suffice. — *Ringo* v. *Richardson*, 53 Mo. 385; *Kennedy* v. *Kennedy*, 57 Mo. 73; *Thomas* v. *Chicago*, 55 Ill. 403. A husband by marriage acquires an absolute right to all the personal property in possession belonging to his wife at the time of the marriage or which comes to her afterwards, not given for her sole and separate use. — *Woodford* v. *Stephens*, 51 Mo. 443; *Kidwell* v. *Kirkpatrick*, 70 Mo. 216; *Terry* v. *Wilson*, 63 Mo. 499; *Bledsoe* v. *Simms*, 53 Mo. 308; *Bangert* v. *Bangert*, 13 Mo. App. 144; *Clark* v. *Nat. Bank*, 47 Mo. 17; *Dallenberg* v. *Wrisberg*, 10 Mo. App. 465. No resulting trust to a portion of land will arise in favor of any one who pays a part of the purchase-money, unless it be paid for some "aliquot" part of the land. — *Wheeler* v. *Kirtland*, 23 N. J. Eq. 13; *McGowan* v. *McGowan*, 14 Gray, 121; *Sayre* v. *Townsend*, 15 Wend. 647; *Olcott* v. *Bynum*, 17 Wall. 44.

W. H. CLOPTON for the respondents: An unauthorized arrangement by a husband will not deprive the wife of her property. — *Eystra* v. *Capelle*, 61 Mo. 578; *Godshall* v. *Ch. Nat. Bk.*, Ct. App. The wife can not be affected by estoppel. She did not know the deed was made to her

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husband. — *Acton* v. *Lynch*, 14 Cent. L. J., No. 8: Bigelow Estop. 486; *Murray* v. *Fox*, 11 Mo. 555; *Hall* v. *Callahan*, 66 Mo. 316; *Watson* v. *St. L. Sm. Co.*, 8 Mo. App. 604; *Suman* v. *Springate*, 67 Ind. 115. Plaintiff bought subject to the equities of the wife and children. He had full notice. — *Major* v. *Bulkley*, 51 Mo. 227. There is no proof that Henry Bangert reduced any of the money or notes belonging or due to his wife into possession. — *Tunnison* v. *Tunnison*, 46 Mo. 77; *Carr* v. *Carr*, 1 Md. 453. After 1875 he could not reduce her choses in action into possession without her consent in writing. — Rev. Stats. p. 560, sect. 3296. The products of the labor of the husband on the land of the wife, which is exempt from his debts, belong to the wife. — *Knapp* v. *Smith*, 27 N. Y. 280; *Feller* v. *Alden*, 23 Wis. 205; *Buckley* v. *Wells*, 33 N. Y. 520; *Gage* v. *Douchy*, 34 N. Y. 297; *McIntire* v. *Knowlton*, 6 Allen, 566; *Dean* v. *Barly*, 50 Ill. 484. There was evidence that plaintiff knew the property was bought with the money of Mrs. Bangert and her children. At any rate, the deeds were executed, etc., before judgment, and were on record before levy and sale. The sheriff's sale, therefore, could convey no title. — *Davis* v. *Ownby*, 14 Mo. 170; *Valentine* v. *Havener*, 20 Mo. 133; *Reed* v. *Ownby*, 44 Mo. 204; *Black* v. *Long*, 60 Mo. 181; *Mann* v. *Best*, 62 Mo. 491.

THOMPSON, J., delivered the opinion of the court.

This case was before the court on a former appeal (*Bangert* v. *Bangert*, 13 Mo. App. 144), and we are therefore relieved of the necessity of restating the facts at length. The petition contains two counts. In the first, the original plaintiff, John Bangert, in the character of a judgment creditor of Henry Bangert, and of purchaser at an execution sale under his judgment against Henry Bangert, of the right, title, and interest of Henry Bangert in certain described real estate, seeks to set aside certain alleged fraudulent

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conveyances whereby the real estate had, shortly before the rendition of his judgment, been transferred by Henry Bangert through the defendant, William Benne, to the defendant, Herman Blum, as trustee for Charlotte Bangert, wife of Henry Bangert. The second count is in the nature of a petition in ejectment, whereby the original plaintiff, John Bangert, seeks to recover the same real estate in virtue of the title acquired by the sheriff's deed to him. After the cause was remanded by this court to the circuit court, John Bangert died, and thereupon the present plaintiffs, D. D. Burns and Lyne S. Metcalf, Jr., claiming as assignees of the original plaintiff, John Bangert, were substituted as parties plaintiff.

I. The first question raised upon this record relate to the right of these plaintiffs to maintain their action At the last hearing in the circuit court, it appeared that the original plaintiff, John Bangert, had, on the 30th day of March, 1880, which was after the institution of this suit, conveyed all the interest he had acquired in the premises in controversy, by a deed of special warranty, to the present plaintiffs, for the consideration of six hundred dollars; that thereafter, on the 10th day of April, 1880, he had also assigned to the present plaintiffs the judgment upon which the execution under which the sheriff's sale to him had taken place, had been issued. It is now contended by the appellants that these substituted plaintiffs have no standing in a court of equity, because they are the purchasers of a bare right to complain of a fraud, which is not an assignable commodity. We have had this question before us in two recent cases, *Jones* v. *Babcock* (15 Mo. App. 149), and *Lionberger* v. *Baker* (14 Mo. App. 353). In the former case, we held that where the record title to land had been entirely divested out of a party by his conveyance of the land in trust, and by a trustee's sale and deed thereunder, such party could not thereafter, by giving a deed of warranty to a third person, pass to him such interest in the land as would enable him to maintain a suit in

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equity to set aside the trustee's sale and deed on the ground of fraud. In the latter case we held that one who has recovered a judgment against another, being allowed by our statute to assign the same, the assignment of a judgment passes to the assignee whatever right in respect of the enforcement of the judgment by supplemental proceedings, the law gave the assignor. This case is governed by the latter, and not by the former of these decisions. Whether the deed by which John Bangert undertook to convey to the present plaintiffs the right, title, and interest in the land in controversy which he had acquired under the sheriff's deed was alone sufficient to pass to these plaintiffs such a title as would enable them to maintain this action, we need not consider; because the judgment upon which these proceedings had been founded was also transferred to them, and this passed to them in the fullest measure whatever rights John Bangert had against the present defend ants. What those rights were we shall not now consider.

II. It was alleged and proved, that about two months before the recovery of the judgment by John Bangert against Henry Bangert, the latter transferred the land in controversy to the defendant, Benne, by deed of warranty, and that Benne thereafter, by a like deed, transferred it to the defendant Blum as trustee for the defendant Charlotte Bangert, who was then the wife of Henry Bangert. It also appeared that no consideration passed to Hen ry Bangert for these transfers. Benne, the intermediary, did not know why he had taken and given the deed; he simply knew that he had paid no money; he stood before the court in the attitude of a mere dummy, in a transaction where a man, knowing that judgment was about to be recovered against him, evidently thought it necessary to resort to this circuity in order to give the transaction the appearance of honesty. It is not claimed by these defendants that these conveyances were founded upon any consideration passing between the parties to them at the time;

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but they allege in their answer, by way of special defence, that, on the 19th day of January, 1876, the date when Henry Bangert acquired title to the land in controversy, he was, and for a long time prior thereto had been the curator of Caroline Tieman, Fredricke Tieman, Emelia Tieman and Henry Tieman, minor children of the defendant Charlotte Bangert, by her first husband; that, as such curator, he had in his charge and control money belonging to them; that the father of these children and first husband of the defendant Charlotte Bangert, died in 1871, leaving a will by which the defendant, Charlotte Bangert, became entitled to and possessed of a valuable real property in the county of St. Louis, Missouri, the rents, issues, and profits of which were large; that the defendant Henry Bangert, acting as the agent of Charlotte Bangert, and as curator of said minor children, purchased said property, paying therefor the sum of $5,600; that said purchase-money was made up of the sum of $1,600 belonging to said minor children jointly, then held and controlled by said Henry Bangert as their curator, and of the further sum of $4,000 belonging to the defendant Charlotte Bangert, being the rents, issues and profits of the real estate belonging to her, which she had acquired by devise from her first husband; that the deed of January 19, 1876, by William Frenz to the defendant Henry Bangert, by which the latter had first acquired title to the land in controversy, was made to Henry Bangert for convenience only; that he never was the beneficial owner of the property; but that, at the time of the delivery of said deed to him, he was merely the trustee, holding the legal title for the defendant Charlotte Bangert's use and benefit, to the extent of her aforesaid interest in the purchase-money paid by her, and for the use and benefit of the said minor children, to the extent of their aforesaid interest in the purchase-money paid therefor; that the transfers which this suit seeks to set aside as fraudulent were not fraudulent, but were made to carry out and more fully declare the aforesaid trusts; and that at the time of

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the sheriff's sale to John Bangert, Henry Bangert had no interest in the land which was subject to execution and sale. A reply put this new matter in issue.

When we remanded this cause on the former appeal, we suggested, that in order that there might be a settlement of the rights of all the parties, the children of Henry Tieman, deceased, whose money, according to the foregoing answer, was in part used to purchase the land, ought to be made parties to the suit. This, however, was not done. The circuit court seemed to think that, somehow or other, the plaintiffs were under obligations to have it done; for, after the cause had been heard and taken under advisement, according to the recitals of the bill of exceptions, "the court announced to the parties that it was unable to arrive at a satisfactory conclusion in the case, on account of insufficiency and vagueness of the testimony as to the rights of the parties in the property, and on account of defect of parties. Whereupon the plaintiffs asked leave, and moved the court to allow them to amend their petition, and make the children of Charlotte Bangert by her former husband, Tieman, parties, and to set down the cause for further hearing on the amended petition; which request and motion of the plaintiffs were by the court denied, to which action of the court the plaintiffs then aud there excepted. Whereupon, on the —— day of November, 1883, the court rendered a decree dismissing the bill." We can not account for this ruling upon any other theory than that the court must have been of opinion that the plaintiffs were under an obligation to make these minor children parties to the suit; that not having done this before going to the hearing, they were not entitled to do it after the cause had been submitted; and that because they had not done so their suit must be dismissed. This view was entirely erroneous. The plaintiffs were under no obligation to make the minor children parties. They sought no relief against them. The claim that the minor children had an interest in the land

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which the plaintiffs were seeking to recover was not a claim made by the plaintiffs, but it was a claim contested by them. It was a claim set up by the defendants as affirmative matter of defence. The plaintiffs were seeking to have whatever title Henry Bangert had in the property divested out of him and vested in them; and a decree giving to them the relief which they claimed would have no effect whatever upon the rights of the minor children. If the mother of such children, and their step-father and curator, who were defendants to the action, had not sufficient interest in protecting their rights to have them made parties, the plaintiffs were, certainly, under no obligation to see that it was done. Moreover, it appears that one of these minor children, Caroline Tieman, had become of age prior to the last hearing in the circuit court, and she was quite at liberty, under our former ruling, to come in and ask to be made a party to the suit, in order to assert any equitable interest which she may have had in the land in controversy.

Under these circumstances, the fact that the children were not made parties we regard as a strong circumstance against the special defence set up in the amended answer. For this ruling alone it would be our duty to reverse the judgment and remand the cause; but as the case has been heard a second time in the circuit court with no better result, so far as the rights of the parties are concerned, than before, we think it our duty to take the evidence and deal with it as chancellors, and end the controversy by a decree in this court.

III. It is perceived that the first count of the petition, to the issue made upon which the proof is directed, is in the nature of a bill in equity to set aside an alleged fraudulent conveyance made by a husband, through a third party, to a trustee to hold the title for his wife. It is also perceived that the defence is that this land was originally purchased by the husband with money belonging to the wife and with other money belonging to the four minor children of the

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wife, of whom he was curator; that instead of having the deed of conveyance made to the wife and children who had thus furnished the purchase-money, he had it made to himself; that he held the title in his own name for some three years, when, on the eve of John Bangert's judgment being rendered against him he conveyed it, through a third party, to a trustee, not for his wife and children according to their respective interests therein, but to a trustee to hold it for the sole and separate use of the wife; and that these conveyances were made to carry out and more fully declare the trusts upon which he thus held the land.

The issue thus tendered is thus seen to have been whether the defendant Henry Bangert held the land in controversy as trustee of a resulting trust in favor of his wife and her children, and whether he made the conveyance for the purpose of declaring and executing such trust.

In order to establish a resulting trust by parol evidence the evidence must be of the most cogent and undoubted character, such as to satisfy the mind of the chancellor beyond a reasonable doubt. *Johnson* v. *Quarles*, 46 Mo. 423; *Ringo* v. *Richardson*, 53 Mo. 385; *Kennedy* v. *Kennedy*, 57 Mo. 73. If this rule were not rigidly adhered to, there would be no security for land titles; for in every case of this kind the establishment of a resulting trust means the establishment of title contrary to what has been written, signed, sealed, and recorded in a deed. But whilst this stringent rule is to be upheld in every suit in equity where it is sought by parol evidence to establish such a trust contrary to the terms of a title deed, yet we are not aware that it has been declared necessary in a case like the present, where the trust, if it existed, is claimed to have been executed by the trustee, and where the deed or deeds by which he claims to have executed it are assailed as fraudulent conveyances by his creditors. But even in these cases the rule is no doubt strong; for, as was said by McGirk, C. J.: "Secret trusts and powers are not favored by the

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law; they are not permitted to stand in the way of creditors and purchasers." *Sibly* v. *Hood*, 3 Mo. 290, 298. Where a debtor makes such a conveyance on the eve of a judgment being recovered against him, the effect of which is to deprive his creditor of the fruits of his judgment, he ought to make it appear by clear and satisfactory evidence, that he made it in the execution of a trust binding upon him in law, or in the discharge of an obligation binding upon his conscience, the performance of which, although to the prejudice of his creditors, the law will uphold.

Turning to the facts of this case, it will appear that it is necessary, in order to support the special defence set up in the answer, to adopt one of two theories: (1.) That the conveyances which are assailed were made by the defendant Henry Bangert, to declare and establish a resulting trust in favor of his wife Charlotte Bangert and her four children, with whose money this land had been purchased; or (2) that, having used the money of the wife and children in purchasing the land for himself, and being indebted to them therefor, he made the conveyance for the purpose of preferring them as creditors.

1. We do not think that the first of these claims has been made out by that satisfactory evidence which the rule above stated requires. It can not escape attention at the outset, that, so far as the defendant Henry Bangert is concerned, the defence which he has set up involves the confession of a breach of trust on his part, as curator of the estates of the four minor children of his wife. Whether he could, without the sanction of the probate court, invest their money in land at all, need not be considered. That he could not lay hold of it *en masse*, mingle it together, mix it with money belonging to his wife, buy a farm with the aggregate sum, and take title in his own name without a recorded declaration of trust in favor of those who furnished the purchase-money is a question which can not be debated. Neither can it escape attention that the deed by

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which it is now claimed that he intended to declare and establish this resulting trust in favor of his wife and her children, is not aptly framed for such purpose. It contains not a word expressive of such a purpose. It says nothing about Henry Bangert having bought the land with the money of his wife and her children, or with money belonging to either of them. It vests the property in a trustee to the sale and separate use, not of the wife and children in certain proportions according to their respective interests, but to the sole and separate use of the wife alone. It is alleged in the answer that the land cost $5,600; that of this sum the wife furnished $4,000, and that the balance was made up of $1,600 which he held as curator of the four children of the wife. But how much of the $1,600 belonged to each child is not alleged. The evidence at the last hearing attempted to prove even more than this answer set up. Mrs. Bangert testified that he not only used $1,600 belonging to the children, but that he used $2,400, which was substantially all the money which he held as curator for the children. This was not only a contradiction in part of what the defendants alleged in their answer, but it contradicted what Henry Bangert had sworn to at the former trial. Mrs. Bangert explains this discrepancy by saying that Mr. Bangert was mistaken in his former testimony. Henry Bangert himself was not put upon the witness-stand at all at the last trial, and consequently, we have not the benefit of his explanation of this discrepancy. The parties thus assume the attitude before the court of taking inconsistent positions — of alleging one thing and attempting to prove another thing, and of proving one thing at one trial and another thing at the next trial. Then, as to the real facts attending the acquisition of this purchase-money, the sole testimony at the hearing was that of Mrs. Bangert. Henry Bangert, the actor in the transactions, who must have known more about it than any one else, did not testify at all. It appears that Henry Bangert transacted the business for his

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wife, and that she had little or no accurate knowledge about the matters in controversy. Probably she had as much knowledge as a wife generally has of business which is attended to by her husband, and that is just what he may choose to tell her. Now, Mrs. Bangert tells her story something like this: That, in order to get together the money to purchase this farm, her husband drew out of the Bremen Bank of St. Louis, $3,000, on a note or notes — that is the way she states it. Of this $3,000, $2,400 was "administration money," that is, money which Henry Bangert had held as administrator of Mrs. Bangert's deceased husband, Henry Tieman, and which he then held as curator of the four children, holding for each the proportion fixed by Henry Tieman in his will. The other $600 belonged to her, Mrs. Bangert. The remaining $2,600 was also money belonging to Mrs. Bangert, which she kept in the house. No check was produced on which this $3,000 had been drawn from the bank. No record of the bank was offered to show such a transaction — no evidence at all except the evidence of Mrs. Bangert, and she admitted that she knew nothing about it except what her husband told her. How she got this $600 she explains in this way: "A neighbor of mine sold wheat for me and put that money in bank with the money Rieman had put in previously." She thinks the name of this neighbor was Penningroff. The balance of the $5,600, which went to make up the price of the land was, according to Mrs. Bangert's testimony, kept in the house. It appears that this sum must have been $2,600 — a very large sum for a farmer's wife to keep in her house in the country; Mrs. Bangert could not tell how much the sum she thus kept in the house was, or how long it had been there. One thousand dollars of it had been there a long time. She had made up the balance by selling hay and corn. She could not tell how long the $1,000 had been there. It was so long that she could not remember; but she finally said it was the year after Tieman died. The bal-

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ance was made on the farm, by which she meant the Columbia bottom farm, which was a farm of eighty-seven acres in cultivation. This farm had been devised by Henry Tieman to his wife for a period of twenty years from the date of his will, after which it was to be distributed equally among his wife and children. She claims in her testimony to have managed the farm and to have worked on it the year round like a field hand. Mr. Bangert and the children also worked upon it, but her testimony puts Bangert down to the mere rank of a field hand. When it came to earning the money on the wife's farm the wife was manager. "I had charge of it and control of it; I was controlling the place at the time, and after I married him." But while she managed the farm and her husband worked for her as a field hand, it seems that he managed the money, and succeeded in investing it in a farm in his own name, holding title to it in that way for three years without her knowing anything about how the title was vested. Mrs. Bangert testifies that ever since the death of her former husband until the purchase of the farm in controversy, she had kept the money which was produced from her farm. "I have always kept it; I have always taken care of it." When Henry Bangert married her he had only eighty dollars, and that he spent at the wedding. He had no property. One child had been born of her marriage with Henry Bangert. All the children of her first husband had lived with her since her first husband died. She never gave Henry Bangert any writing authorizing him to buy any farm. "Whenever he has sold anything he has turned it over to me always."

If we give full effect to this testimony, it will appear that, of the $5,650, which appears to have been the purchase-price of the Frenz farm, $2,650 were given by Mrs. Bangert to Henry Bangert, out of moneys which she had kept in the house, the same being accumulations of sales of produce of the Columbia bottom farm, on which her former

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husband died, and on which she has ever since lived both before and after her marriage with her present husband, Henry Bangert. It will also appear that of this $2,650, $1,000 was the result of accumulations by Mrs. Bangert from sales of produce of the farm during her widowhood, and that the remaining $1,650 was money which had accumulated from sales of produce of the same farm during the period of about three years which intervened between her marriage with Henry Bangert, and the purchase of the Frenz farm. Whether it can be inferred from this testimony that any money of Henry Bangert went into the purchase of the Frenz farm depends upon the question who was the legal owner of this $1,650. There is no evidence of any separate ownership of this money by Mrs. Bangert, other than the fact that she always had it in her personal custody at the house, and that it was the proceeds of a farm in which an estate for twenty years had been vested in her by her former husband.

The general rule is that possession of personal property is *prima facie* evidence of its ownership; but this rule seems to have no just application where the question of ownership arises between husband and wife, because the possession of their personal property is necessarily in a large measure a joint possession. The general rule must be held to be, that whether the possession be physically in the husband, or in the wife, the title is presumptively in the husband.

The act of 1875 (Rev. Stats., sect. 3296), does not seem to have changed this rule in its application to such a case as that before us. Of course the rule must, since the passage of this act, give way in many cases to special circumstances which may attend the possession.

If a wife were carrying on business in her own name as a *feme sole trader*, — her name on a sign above her place of business, her money deposited in bank in her own name, and in her own name checked out by her, — these circum-

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stances, it is supposed would rebut this presumption. But the mere fact that husband and wife are living together on a farm and accumulating money by the joint earnings of themselves, of the minor children of the wife and of hired men, and that the moneys so accumulated are kept at home by the wife, do not seem to be sufficient to rebut this presumption.

This, we think, would be so, even under the act of 1875. But it seems that Henry Bangert intermarried with the widow Tieman in 1873, and therefore the question is to be decided with reference to the law as it then stood. The law as it then stood has been expounded in two cases in our supreme court. These decisions, overruling the contrary *dictum* in *Tennison* v. *Tennison* (46 Mo. 77), hold, in the language of Adams, J., as follows: "The husband, by marriage, acquires an absolute right to all the personal property in possession belonging to his wife, and that all subsequent acquisitions by his wife of *choses* in possession, vest absolutely in him unless such acquisitions be given or transferred to her or to him for her sole and separate use. Where a husband, by means of the marriage, acquires the absolute right to personal property in possession, he can not be declared a trustee for his wife by loose and general remarks made in conversations. To establish such a trust against the husband, the authorities are united that the evidence must be clear and unequivocal." *Woodford* v. *Stephens*, 51 Mo. 443, 447; *Kidwell* v. *Kirkpatrick*, 70 Mo. 214.

In an earlier case, where the same question was under consideration, it was said by Scott, J.: "Nothing is clearer at law than that the wife can not be the recipient of a gift from the husband so as to vest in her a legal title to the subject-matter of the gift. Their unity prevents it. The personal property of the wife at law belonging to the husband, so soon as a gift is made to the wife, the

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gift becomes the property of the husband. Courts of equity, however, where the intention of the husband is plain that his wife should have to her separate use a portion of his estate, and *when the rights of creditors are not in the way*, will raise in him a trust, when no third person is interposed as trustee, and will compel him, for the benefit of his wife, to execute the trust with which the property may have been clothed." In the case from which this is quoted, the husband was in possession of personal property bequeathed to his wife by a former husband, as administrator of such former husband. He made a final settlement, and it was ordered by the court that he and his wife should retain all the proceeds of the estate of the deceased in their hands. It was held that the possession of the husband, as administrator, ceased, and that his possession, *jure mariti*, commenced at the date of this order. *Walker* v. *Walker*, 25 Mo. 367, 375.

In another part of the same opinion the learned judge uses the following language: "In contemplation of law, property is reduced into possession when it is in such a state that the husband can lawfully take it into his hands if he will. It is not necessary that he should have actually taken it into his custody. If he has a right to do so at his will, it is enough. When no suit at law or equity is necessary to obtain possession of personal property, and the husband may, if he will, take actual possession of it, but fails or neglects to do so, the property is not the less reduced into his possession. The objection that the property was not reduced into possession must rest either in the idea that it was in the possession of the wife, or that it was held by the husband as administrator. Both of these grounds are untenable. If the property was in the possession of the wife, then the possession of the wife was the possession of the husband." *Ibid.* 376. Applying these principles

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to the facts of this case, the conclusion is unavoidable that all of that portion of the money which was used by Henry Bangert in the purchase of this farm, amounting to the sum of $4,000, which the defendants claim in their answer was the money of Mrs. Bangert, is to be deemed to have been the money of the defendant Bangert. When he married the widow Tieman, and went to live with her on the Columbia bottom farm, he is deemed in law to have entered into possession of her estate for years in the farm under the deceased husband's will, which was a chattel interest, and also of all chattels upon the farm belonging to her. There is no evidence whatever of any agreement at that time, or of any purpose on his part to hold these chattel interests as her trustee, or in any other than his own right as her husband, under the law as it then stood. The $1,000 which she claims to have owned, became his, *jure mariti*, under the decision above quoted from twenty-fifth Missouri. Although it may not have been taken into his physical custody — though Mrs. Bangert may have kept it in the cellar in an oyster can, as she testified at the former trial, — yet, as he had a right to reduce it into his possession at will, that was enough. He and she were one in law, and her possession was his possession. In addition to this, his entire course of dealing with Mrs. Bangert's money and personal property, as disclosed by her own testimony, not only fails wholly to indicate a purpose on his part to hold it as her trustee, but indicates a purpose to hold it in his own right, as he might lawfully do. Whenever he wanted money that was kept in the house he went and took it. The money that was kept in the Bremen Bank seems to have been kept there in his name. He went and drew it when he wanted it, and when he purchased this farm, instead of taking title in the name of his wife, he took title in his own name, just as any other man would do in dealing with money which

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he regarded as his own. If a trust could be raised in favor of the wife upon this sort of testimony, there is no case in which the joint possession by husband and wife might not be regarded either as the possession of the husband or of the wife, accordingly as it would be most convenient to regard it for the purpose of cheating the creditors of the one or the other.

There is, therefore, no difficulty in saying that so far as the defence set up in the answer that $4,000 of the purchase-money of the Frenz farm belonged to the wife in her own right is concerned, the defence has not been made out.

Then, as to the case of the children, it is sufficient to say that they have not been made parties, and that the decree which will be entered will not prejudice them in the future assertion of any right which they may have in the premises. As we have observed, neither their mother nor their step-father and curator has thought it right to bring them forward as parties. Caroline, who was of age, did not ask to be made a party. Henry Bangert, who of all others knew most about these transactions, delivered a mass of contradictory testimony upon the former hearing, but said not one word upon the present hearing. If he had come forward on the present hearing and testified as he did at the former hearing, he would have delivered testimony in direct conflict with his sworn statements made as administrator *de bonis non* of Tieman's estate, and as curator of these children; for the evidence shows that he purchased the Frenz farm for cash on the 19th of March, 1876, and that, subsequent to that time, namely, on the 19th of January, and again on the 27th of March, 1877, he filed two settlements as such administrator, under oath, charging himself with the full amount of assets which had come into his hands, stating that the same consisted of cash; and that at divers subsequent periods, he filed sworn settlements as curator of the four minor children, charging himself with the full

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amount of the distributive share of each one in the deceased father's estate, stating that the same was "loaned out," and it was not until his second annual settlement as such curator, namely, in the year 1881, after this suit had been brought, that he gives in these settlements any intimation of having invested any of the money of the children in hand; and then the only intimation of this fact which he conveys is in the following language: In his second annual settlement as curator of Fredericke Tieman, filed on the 14th of June, 1881, he states, after charging himself with this ward's portion of the estate and interest from the last settlement: "Part of the above is inventoried in real estate held in trust for said minor and part loaned out." In his second settlement with Emelia Tieman, filed on the same day he states: "This money is also invested in real estate partly, and partly loaned, thinking that the best use to put it to." In his settlement with Henry Tieman, filed on the same day, there is this statement: "This curator reports that this money has been invested in real estate, and is held in trust for Henry Tieman." In his final settlement with Caroline Tieman (who had come of age), filed on the following day, there is no such statement; but Caroline purports to waive notice and all other requisites to a final settlement prescribed by section 2610 of the Revised Statutes.

It is quite clear that this evidence is not of that satisfactory character which is required to establish a trust in land in favor of the wife of a debtor as against the rights of his creditors.

2. Whether this evidence is sufficient to uphold the conveyances sought to be set aside, as having been made to prefer certain creditors need not, perhaps, be considered, because this is not the claim made in the answer. Besides, we have seen that as to the wife there is no satisfactory evidence that she was a creditor; and we do not pass upon the rights of the children, they not being before the court.

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It follows that the plaintiffs are entitled to have these deeds set aside, and to have the legal title of Henry Bangert, as it stood in him prior to the making of these deeds, vested in them. The legal title carries with it the right to possession, and they are accordingly entitled to be put in possession under the second count in their petition.

It appears by the testimony of Mrs. Bangert that the annual rental value of the land is $225. They are entitled to a judgment against Henry Bangert and wife for mesne profits based upon the annual rental value from the date of the commencement of this suit.

A decree will be entered in this court accordingly. This decree will have no effect upon any rights which the minor children of Mrs. Bangert may have in respect of the land in controversy as they have not been made parties to the suit. It will, however, conclude the rights of Mrs. Bangert. It is ordered accordingly. All the judges concur.

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Ex parte I. M. Mason.

June 10, 1884.

1. **Habeas Corpus — Jurisdiction.** — Inquiry under a writ of *habeas corpus* is generally limited to the question as to whether the process under which the prisoner is held was issued by a court of competent jurisdiction and in a case allowed by law.
2. —— **Contempt — Notice — Practice.** — The court may issue an attachment for a person accused of contempt committed out of the presence of the court, without first making a preliminary order to show cause.
3. —— An attachment, which sets forth specifically the act charged as contempt of court, is such notice as will satisfy the statute.
4. —— In a proceeding by *habeas corpus*, it will not be presumed that the person accused of contempt will be punished without a fair hearing.
5. —— An attachment for contempt being regularly issued by the circuit court of one county against the sheriff of another county for refusing to execute the process of the court in his bailiwick, the prisoner will not be discharged under a writ of *habeas corpus*.

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Application for a writ of *habeas corpus*.

Prisoner remanded.

Krum & Jonas, for the petitioner.

Thompson, J., delivered the opinion of the court.

The petitioner, Isaac M. Mason, sheriff of the city of St. Louis, has been arrested and detained by Sylvester Nidelet, coroner of said city, under an attachment issued by the circuit court of Webster County, charging the petitioner with a contempt of said court in refusing to execute an attachment issued by said court against a witness on behalf of a defendant who stood indicted for the crime of arson. The petition sets forth in *hæc verba* the attachment under which the petitioner is detained. This attachment sets forth the particular circumstances of the offence charged against the petitioner as a contempt, and it hence complies with the provisions of section 1058 of the Revised Statutes. By the *habeas corpus* act "no court * * * shall * * * have power to inquire into the legality or justice of any process, judgment, decree, or order of any court legally constituted." Rev. Stats., sect. 2651. Provisions exist in the *habeas corpus* act forbidding the discharge of the prisoner where he is held for a contempt, "specially and plainly charged in the commitment." Rev. Stats., sects. 2648, 2651. These last provisions do not apply to the case before us, because the petitioner is not held under a commitment, which issues after a *conviction*, but under an *attachment*, which is initial process. The case is therefore governed by the clause above quoted from section 2651.

Jurisdiction under the writ of *habeas corpus* to inquire into the cause of detention, where it appears, the prisoner is held under legal process before judgment, is generally limited to the inquiry whether the process under which the prisoner is held has been issued by a court of competent jurisdiction and in a case allowed by law. If the writ of attachment, under which the petitioner is held, has been issued by such a

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court and in such a case, we are forbidden by the provision of the *habeas corpus* act above quoted, from inquiring into its justice or legality, — the word legality not being here used in the sense which would exclude inquiries touching matters of jurisdiction.

The defendant in the indictment for arson in the circuit court of Webster County was entitled to compulsory process to secure the attendance of witnesses in his behalf. Const. Mo., art. II., sect. 21. He was entitled to such process, and any witness subpœnaed in his behalf was bound to attend, without the payment or tender of any fees for such attendance (Rev. Stats., sect. 1850); and a witness so subpœnaed was liable to be compelled so to attend by a writ of attachment against his body, which might be served in any county in this state. Rev. Stats., sects. 1850, 4022. By section 3891 of the Revised Statutes "every sheriff shall * * * execute all process directed to him by legal authority."

Under these provisions there can be no question that the writ of attachment recited in the attachment against this petitioner for contempt, issued by the circuit court of Webster County commanding this petitioner, as sheriff of the city of St. Louis, to attach the body of F. C. Norvell, who had been subpœnaed as a witness on behalf of the defendant in the case of the state of Missouri against T. K. Paul, indicted for arson, pending in said court, was lawful process, which the sheriff was bound by law to execute.

Power in a court of record to issue process to a sheriff, or other officer of the state appointed to execute the same, necessarily implies a power to compel obedience on the part of such officer, to the end that the same be executed. The Revised Statutes, giving effect to this principle of common law, provide that "each court may enforce by attachment the return of any writ or process sent out of the same court." Rev. Stats., sect. 1040. It is also provided that "every court of record shall have power to punish, as for a criminal contempt, persons guilty of any of the following acts:

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3d. * * * Wilful disobedience of any process or order **lawfully issued or made by it."** Rev. Stats., sect. 1055.

There can be no question then that the attachment under which the petitioner is held has been issued by a court of competent jurisdiction and in a case allowed by law, unless an objection urged on his behalf is to be regarded as a sound one. This will now be considered.

It is provided in the Revised Statutes that "contempt committed in the immediate view and presence of the court may be punished summarily; in all other cases, the party charged shall be notified of the accusation and have a reasonable time to make his defence." Rev. Stats., sect. 1057. It is argued that in issuing an attachment without any preliminary order to show cause, the circuit court of Webster County is proceeding in violation of this provision. We do not so understand it. The statute is merely declaratory of the common law. A contempt of court is in the nature of a crime against the state. Beyond question, before a person can be subjected to punishment for such an offence, he is, by the principles of the common law and by the guaranties of American constitutions, entitled to notice, and to an opportunity to be heard in his defence, and a conviction which takes place without notice is merely void. *The State* v. *Mathews*, 37 N. H. 450, 454; *The People* v. *Turner*, 1 Cal. 152; *Sommersett* v. *Zellers*, 2 Halst. (N. J.) 31; *Ex parte Langdon*, 25 Vt. 680; *Worcester* v. *Truman*, 1 McLean (U. S.), 483, 485; *Ex parte Ireland*, 38 Texas, 344. The right secured by the statute being, then, merely a right which existed at common law, and which is understood to be secured by constitutional guaranties, it remains to consider whether, in the case of a contempt committed out of the immediate presence of the court, this right of the accused is infringed by issuing an attachment against him in the first instance, without a preliminary order to show cause.

According to the more usual practice in these cases, there

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are two proceedings which are analogous to the preliminary examination and the trial in an ordinary criminal prosecution. The first is a preliminary order to show cause, not why the accused should not be punished for the alleged contempt, but why an attachment should not be issued against him for the same. Upon the return of this order, there is regularly a proceeding somewhat in the nature of a preliminary examination in a criminal case. The accused may appear either in person or by counsel. The formalities of a regular trial are dispensed with. He may show cause by *ex parte* affidavits, or in any other appropriate mode. If he fails to show sufficient cause, an attachment is regularly issued, upon which he is arrested and brought before the court and there required in person to answer interrogatories. At common law, his answers are conclusive in his own favor; but according to the English chancery practice, countervailing evidence will be heard. This is the formal trial which takes place; and if, upon this trial, he fails to purge himself, the court proceeds to assess the punishment. This may be regarded as a fair outline of the more usual practice in American courts.

But, while it is usual in cases like the one at bar to proceed by a preliminary order to show cause, it is well settled that the court may, in the exercise of a sound discretion, dispense with the order to show cause, and proceed by attachment in the first instance. The power to do this in many cases is highly essential — as where an evasive return is made to a writ of *habeas corpus* (*Matter of Stacy*, 10 Johns. (N. Y.) 328; *United States* v. *Bollman*, 1 Cranch (U. S. C. C. 373; *The State* v. *Raborg*, 2 South. (N. J.) 545; *Rex* v. *Winton*, 5 T. R. 89; *Rex* v. *Wright*, Strange, 915); or where a sheriff returns a rescue (*The State* v. *Ackerson*, 25 N. J. L. 209); or where the proceeding is in aid of a civil remedy and the accused is about to abscond. It seems to be universally agreed among the American courts that the court is at liberty, in the exercise of a sound discretion,

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to proceed in the first instance in either mode (*Fanshawe* v. *Tracy*, 4 Biss. (U. S.) 490, 496; *Matter of Stephens*, 1 Ga. 584, 587; *Petrie* v. *The People*, 40 Ill. 335, 344; *Thomas* v. *Cummins*, 2 Yeats (Pa.), 1; compare *Andrews* v. *Sharp*, 2 Bla. 912; *Rex* v. *Peckham*, *Id.* 1218; *Matter of Smethurst*, 2 Sandf. (N. Y.) 724; *Kernodle* v. *Cason*, 25 Ind. 362); and that no constitutional right, or right existing at common law is infringed by proceeding by an attachment in the first instance. *Ex parte Petrie*, 38 Ill. 498; *Ex parte Langdon*, 25 Vt. 680. The attachment, it must be remembered, is not a commitment. It does not issue in consequence of an adjudication, nor does it purport to adjudicate the guilt of the accused. *McCreadie* v. *Senior*, 4 Paige, 378. It is merely a compulsory writ, whose office it is to bring him before the court, where he will be allowed full opportunity to make his defence. *Jackson* v. *Smith*, 5 Johns. (N. Y.) 117; *The State* v. *Mathews*, 37 N. H. 450, 453.

An attachment like the one under consideration, which sets forth specially and plainly the matter of contempt charged against the accused, is in itself notice, and in this regard it complies with the requirements of section 1057 of the Revised Statutes, that "the party charged shall be notified of the accusation." The attachment before us does not adjudicate the guilt of the petitioner. It requires him to be brought before the circuit court of Webster County on a day named, "then and there to answer for a contempt of this court, and to show cause why he should not be further dealt with according to law." We can not anticipate the action of the circuit court of Webster County, and presume that the petitioner will be deprived of the other right which the statute gives him, namely, "a reasonable time to make his defence."

It thus appears that the attachment under which the petitioner is held is process issued by a court of competent jurisdiction and in a case allowed by law. Every superior

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court of record is, within the limits prescribed by statute, the exclusive judge of contempts committed against its authority. It is not competent for any other court to intercept its process, lawfully issued, or to anticipate its judgment, by inquiring into the merits of the matters in respect of which its process has been issued.

It is ordered that prisoner be remanded to the custody of the coroner of the city of St. Louis. All the judges concur. Judge Lewis files a separate opinion.

Separate opinion by Lewis, P. J.

If the petitioner is answerable for a contempt, the case is one in which, by command of the statute, he "shall be notified of the accusation, and have a reasonable time to make his defence." Regarding him merely as a citizen, entitled to every presumption of innocence until proved to be guilty, I think there is no sort of compliance with the statute, when he is arrested, deprived of liberty, and dragged in custody to a distant county, there to prove his innocence, if he can. The proceeding assumes that he is guilty enough for that any how, and tries him afterwards. I think the legislature meant something when it substituted a restrictive rule for the discretion vested in the courts by the common law to proceed either with or without previous notice.

But the law which directed the petitioner, as sheriff, to execute the process of the Webster circuit court made him, for all the purposes of that process, an officer of the court. Every court has authority to compel the personal attendance of its officers, when necessary to the due performance of its functions, or in vindication of its authority. On this ground alone I think it is proper to remand the prisoner.

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THE STATE OF MISSOURI EX REL. J. W. CAMPBELL, Appellant, v. POLICE COMMISSIONERS ET AL., Respondents.

June 17, 1884.

1. OFFICERS — SUSPENSION FROM OFFICE. — The suspension from office of an officer by the tribunal before whom he is to be tried, pending his trial in due form upon charges a conviction of which would involve his dismissal from office, is not an arbitrary or improper exercise of authority.

2. —— PROHIBITION — UNREASONABLE DELAY. — That the order of suspension intimates that the hearing of the charges will be postponed until a decision is reached in a mattter pending and which involves the nature and limitation of the jurisdiction of the tribunal over the officer, furnishes no ground for prohibition of the suspension or of the filling of the office pending the suspension.

APPEAL from the St. Louis Circuit Court, BARCLAY, J. *Affirmed.*

JOHN G. CHANDLER and C. F. JOY, for the appellant.

A. R. TAYLOR and J. M. GLOVER, for the respondents.

LEWIS, P. J., delivered the opinion of the court.

This was an application to the circuit court for a writ of prohibition. The petition shows that the relator is chief of police, and the defendants constitute the board of police commissioners of the city of St. Louis. That the commissioners are authorized by law to suspend from the police force any member thereof, after trial and due hearing, and upon proper cause and charges, and not otherwise. They are further authorized by law to make rules for such trials, and for the government of the police: and, in pursuance of such authority, have made certain rules now in force, including rule 167, which is copied into the petition. That defendants Lutz and Caruth have filed with said board charges and specifications against the relator, alleging that he is guilty of language and conduct unbecoming an officer and a gentleman, and of violations of said rule 167. That the relator was present with his

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counsel and witnesses at a meeting of the board ready for a hearing on said charges, when the board sat with closed doors, and in secret session; and, without the knowledge or consent of the relator, passed resolutions providing for the taking of an appeal to the supreme court from a certain judgment of the St. Louis Court of Appeals, and for the postponing of a hearing of the said charges against the relator, until after a decision should be made by the supreme court on said appeal. That the said charges on their face, if true, embrace matters merely of disrespect or misconduct towards the defendants Lutz and Caruth, who have a personal and direct interest in sustaining the said charges, and are therefore imcompetent to sit in judgment thereon, or in any matter directly or indirectly connected therewith, or involved therein. That defendant Lutz has offered in the board for adoption a resolution as follows: "*Resolved*, That pending the charges heretofore preferred against him by members of this board, John W. Campbell be suspended as chief of police, and that during such suspension, B. P. Taaffe discharge the duties of chief, and the said John W. Campbell be and he is hereby ordered to turn over all the property and effects of the police department in his possession, to said B. P. Taaffe." That if passed and enforced the said resolution would operate to punish the relator, and deprive him of his office without cause and without a hearing, and that, in the present condition of business in the supreme court, said appeal will not be determined until after the expiration of the relator's legal term of office; that the relator has protested in writing to the defendants against their proposed action, and requested them to desist from the same, but without effect. The petitioner prays for a writ of prohibition to prohibit the defendants from proceeding upon the said resolution, and the said Taaffe from accepting or discharging the duties proposed to be devolved upon him. The defendants demurred generally to this petition, and their demurrer was sustained.

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It is urged, as a sufficient ground for affirming the judgment, that prohibition does not lie against such a body as the board of police commissioners; but only against a court or some officer or body exercising strictly judicial functions. The relator meets this by referring us to the recent case in which we sustained *certiorari* against the same board. 14 Mo. App. 297. It is not shown to us, however, that prohibition may be employed as a preventive in all cases, or wherein *certiorari* would be the remedy for a wrong done, nor have our researches enabled us to find any recognition of such a rule. There may be, on principle, many excellent reasons for that conclusion, but a comparison of authorities on the two subjects does not seem to justify it beyond a doubt. It is not necessary to pass upon the point, in this case, since, in our view, the judgment should be affirmed on other grounds. The petition shows that the defendants have, by methods which the law prescribes, acquired jurisdiction of the matter of inquiry which they are about to hear and determine. The relator charges, however, that, in their proposed resolution suspending him from office pending the trial, they virtually pronounce judgment against him, without a hearing. We do not perceive that such will be a necessary effect. The suspension of an officer, pending his trial for misconduct, so as to tie his hands for the time being, seems to be universally accepted as a fair, salutary, and often necessary incident of the situation. His retention, at such a time, of all the advantages and opportunities afforded by official position may enable and encourage him, not only to persist in the rebellious practices complained of, but also to seriously embarrass his triers in their approaches to the ends of justice. In the absence of any express limitation to the contrary, and none has been shown, we are of opinion that, in cases were guiltiness of the offence charged will involve a dismissal from office, there is, on general principles, no arbitrary or improper exercise of a supervisory authority in a suspen-

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sion of the accused pending his trial in due and proper form.

The relator calls our attention to the fact that the resolution proposes a suspension far beyond a reasonable time for the duration of the trial; that this suspension is to continue until after a decision of the supreme court, which is not likely to be rendered during the present term of the relator's office. If it appeared on the face of the resolution that such was its object — that the reference to a supreme court proceeding was only by way of device for effectually ousting the relator without a trial — there can be no question that this would be an inexcusable act of usurpation and a conscious violation of official obligations on the part of the commissioners. But we can not presume such an official purpose from the private personal motives alleged in the petition. It is proper to assume that the officers are actuated by a fair sense of duty, and that they honestly desire to be enlightened by the court of last resort upon the nature and limitation of their jurisdiction over the chief of police before proceeding any further in disciplinary measures. They can neither know nor intend that the supreme court will not with reasonable celerity determine the appeal, or will not, upon a proper application, even advance the cause on the docket. Such at least is the present aspect of the case for which prohibition is demanded.

The accused chief is entitled to a speedy trial; that is, to a trial without unreasonable or vexatious delay. If at any time after the passing of the resolution objected to it should appear that the delay of trial is practically unjust and oppressive, whether it shall have become so by reason of delays in the supreme court, or from other causes, there would then be both time and occasion for the appropriate compulsory method of hastening the proceedings before the commissioners.

We find no error in the refusal of prohibition upon the case stated, and therefore affirm the judgment. All the judges concur.

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ST. LOUIS GAS-LIGHT COMPANY, Respondent, *v.* ST. LOUIS GAS, FUEL AND POWER COMPANY, Appellant.

June 17, 1884.

1. CONSTITUTIONAL LAW — HIGHWAYS — STREETS — PRIVILEGES — MONOPOLY. — The state has proprietary control over highways, and a grant by it of a part of that control does not violate the constitutional provision against granting exclusive privileges.
2. —— The state may make such a grant with terms and conditions which give it the force of an inviolable contract which can not be affected by subsequent legislation.
3. —— The state constitution of 1820, article 18, section 20, by its terms, prohibits the granting of any exclusive privilege, hereditary or otherwise.
4. —— The state can not confer upon any individual or corporation the sole and exclusive privilege of making or vending any commodity.
5. —— A grant of such a privilege is a monopoly prohibited by common law and by the state constitution of 1820.
6. —— So much of the charter of the St. Louis Gas-Light Company as purports to grant an exclusive privilege of making and vending gas, is void.
7. —— So much of that charter as grants an exclusive right to use the streets for laying gas pipes, is valid, and, for the time being, is enforceable.
8. ORDINANCES — CONSTRUCTION OF. — An ordinance granting a right to lay pipes in the public streets must be strictly construed, and its purposes can not be enlarged by construction.

APPEAL from the St Louis Circuit Court, LUBKE, J.

Reversed and judgment.

RANDALL MORGAN, JAMES O. BROADHEAD, HENRY M. POST and TRUMAN A. POST, for the appellant: The charter of the St. Louis Gas-Light Company, in so far as it attempted to grant to that company the exclusive right irrevocable for fifty years, to manufacture and sell gas and gas-light to private consumers in the city of St. Louis, was void, because: 1. Such a grant was contrary to section 20 of the bill of rights, of the Missouri state constitution of 1820, in force at the time of the adoption of plaintiff's charter. — See *Citizens' Gas-Light Co.* v. *Louisville Gas Co.*, Ky. L. Rep., August, 1883, p. 72; *McRee* v. *Wil. & R. R. Co.*, 2 Jones (N. C.), 190; *Norwich Gas-Light*

Co. v. *Norwich City Gas Co.*, 25 Conn. 1. 2. Any attempted grant by the legislature of the exclusive right to vend gas-light to private consumers in the city of St. Louis, was void, independently of constitutional restrictions; because the right thus to vend it was not a franchise emanating from the State, in which the State had a direct interest, and which it might bestow or deny at pleasure; but it was a right to traffic in an article of merchandise of general consumption and utility to the public; and to vest such a right in one company exclusively was nothing but a monopoly in derogation of common right, which the legislature had no power to grant. — See *Penn. R. R.* v. *Nat. R. R.*, 23 N. J. Eq. 450; *Rar. & Del. B. Co.* v. *Del. R. C. Co.*, 18 N. J. Eq. 570; *Bank* v. *Earle*, 13 Pet. 519, 595; *Jersey City Gas Co.* v. *Dwight*, 29 N. J. Eq. 248, 249; *West Sav. Fund Soc.* v. *Phil.*, 31 Pa. St. 183; *Bd. Park Com.* v. *Common Council*, 28 Mich. 238; *Live Stock Assn.* v. *Crescent City, etc.*, 1 Abb. (U. S. C. Ct.) 399; *Meth. Ch.* v. *Clarke*, 41 Mich. 737; *Atty.-Genl.* v. *Bound Brook R. R.*, 27 N. J. Eq. 19; *The People* v. *Mulholland*, 82 N. Y. 326; Cooley's Const. Lim. (5th ed.), 344, *284; Ang. & Ames on Corp., sect. 737; High Extr. Leg. Rem., 650, sects. 471, 472; *The People* v. *Utica Ins. Co.*, 15 Johns. 379, 389; *The State* v. *Bost. & Con. R. R. Co.*, 25 Vt. 442, 443; *The State* v. *Real Estate Bank*, 5 Ark. 599; 2 Bla. Com. 37; *C. C. & W. Co.* v. *The People*, 73 Ill. 547; *Thompson* v. *The People*, 23 Wend. 569; *The People* v. *Ridgely*, 21 Ill. 69; *The People* v. *Trustees*, 5 Wend. 211; *Norwich Gas-Light Co.* v. *Norwich City Gas Co.*, 25 Conn. 1; *Citizens' Gas-Light Co.* v. *Louisville Gas Co.*, Ky. L. Rep., August, 1883, p. 72; *The State* v. *Fisher*, 52 Mo. 177; *Loan Association* v. *Topeka*, 20 Wall. (U. S.) 659, 663; *City of Chicago* v. *Rumpff*, 45 Ill. 99; *Regents* v. *Williams*, 9 Gill & J. 408; *Baltimore* v. *The State*, 15 Md. 469; *Billings* v. *Hall*, 7 Cal. 1; *Thorpe* v. *R. & B. R. Co.*, 27 Vt. 143; *Wilkinson* v. *Leland*, 2 Pet. 657; Von Holdt Const. Hist. U. S. 20; Story on Const. 628;

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Mayor v. *Thorn*, 7 Paige Ch. 261; 6 Coke, 112, case "Monopolies;" Bacon's Abr., title "Monopolies." — The state, while it has full police control over the public streets and full power to regulate their use, would have no power to confer on one gas company the exclusive right to employ the only channels and facilities for engaging in common merchandise. — *Norwich Gas Co.* v. *Norwich City Gas Co., supra; Citizen's Gas Co.* v. *Louisville Gas Co., supra; The State* v. *Cincinnati Gas-Light Co.*, 18 Ohio St. 262. Plaintiff's "exclusive right" can not be construed to embrace the gas manufactured by defendant. — See *Grumley* v. *Webb*, 44 Mo., 457; *The City* v. *Laughlin*, 49 Mo. 559; Sedgw. Stat. Law, 423; *Butler's Appeal*, 73 Pa. St. 452; *Sandemann* v. *Breach*, 7 Barn. & C. 96; *U. S.* v. *Irwin*, 5 McLean, 179; *Chapman* v. *Forsyth*, 8 How. 208; *Jackson* v. *Stackhouse*, 1 Cow. 122. The exclusive grant should certainly be limited to the boundaries of the city of St. Louis, as they existed at the time of the passage of plaintiff's original charter in 1837.—*Penn. R. R. Co.* v. *Can. Comm.*, 21 Pa. St. 22; *The State ex rel.* v. *Gas-Light Co.*, 18 Ohio St. 293, 294. If plaintiff can not recover by virtue of its exclusive rights as against all comers, under its charter grant, it can not take advantage in this proceeding of any infirmities (if such there be) in defendant's grant of power to sell illuminating gas, or to lay mains, since without such conclusive right, it can show no special injury to itself. — *O'Brien* v. *R. R.*, 17 Conn. 372; *Wesson* v. *Washb. Iron Co.*, 13 Allen, 95; *Pudsey Coal Gas Co.* v. *Corporation of Bradford*, L. R. 15 Eq. Cas. 169, 172, 173; *Stockport District Water Works Co.* v. *Mayor of Manchester, etc.*, 9 Jur. (N. S.) 266, 267; *Del. & Rar. Can. Co.* v. *Railroad*, 16 N. J. Eq. 381; *Bonaparte* v. *Camden, etc., Railroad*, Baldw. 231; *St. John* v. *McFarlan*, 33 Mich. 72; *Atty.-Genl.* v. *Tudor Ice Co.*, 104 Mass. 239; *Pixley* v. *Railroad*, 75 Va. 320; *Atty.-Genl.* v. *Bound Brook R. R.*, 27 N. J. Eq.

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1; *Soc.* v. *Morris, Can. & B. Co.*, 1 N. J. Eq. 157; *Pres.* v. *Trenton City Br. Co.*, 13 N. J. Eq. 46; *Morris & Essex R. R.* v. *Pruden*, 20 N. J. Eq. 530; *Soc.* v. *Butler*, 12 N. J. Eq. 498; *Nat. Docks R. R.* v. *Railroad* 32 N. J. Eq. 755. That, in general, violations of a charter can not be inquired into, except in a direct proceeding instituted by a party having a special interest, or the State. — See *State Bank* v. *Merch. Bank of Baltimore*, 10 Mo. 130; Ang. Ames on Corp., sects. 777, 636; *Heard* v. *Talbot*, 7 Gray, 120; *Dyer* v. *Walker*, 40 Pa. St. 160; *Bank* v. *Trimble*, 6 B. Mon. 601; *Grand Gulf Bk.* v. *Archer*, 8 Smed. & M. 173; *The City* v. *Shields*, 62 Mo. 252; *Brookville Turnpike Co.* v. *McCarty*, 8 Ind. 394; High. Extr. Leg. Rem., sect. 654; *Nat. Docks Co.* v. *Central R. R.*, 32 N. J. Eq. 755; *Grand Rapids Br. Co.* v. *Prange*, 35 Mich. 403; *Swartwout* v. *Mich. Air Line*, 24 Mich. 389; *Thompson* v. *Candor*, 60 Ill. 248. The city had power, under its charter, to pass ordinance 11,358. See *The State* v. *Cincinnati Gas-Light and Coke Co.*, 18 Ohio St. 291, 295; *Milhau* v. *Sharp*, 15 Barb. 211, 212; *Plant* v. *Long Isl. R. R.*, 10 Barb. 25, 28, 29; *Smith* v. *Met. Gas-Light Co.*, 12 How. Pr. 189; *Norwich Gas Co.* v. *Norwich City Gas Co.*, 25 Conn. *supra*; *Fisher* v. *Harrisburg*, 2 Grant (Pa.), 296; *Strawbridge* v. *Phil.*, 13 Rep. 218; *West* v. *Bancroft*, 3 Vern. 37; Ang. on Highw., 312; Cooley's Const. Lim. 194, 195; *The People* v. *Metr. Gas-Light Co.*, 38 Mich. 154; *Atty.-Genl.* v. *Sheffield Gas Co.*, 22 L. J. Ch. 811; affirmed in *Atty.-Genl.* v. *Cambridge Gas Co.*, 38 L. J. 94; *Williamsport* v. *Comm.*, 82 Pa. St. 494.

GLOVER & SHEPLEY and MADILL & RALSTON, for the respondents: The charter of the plaintiff confers upon it the right to lay pipe in the streets and suburbs of the city of St. Louis and to manufacture and vend gas for light and other purposes and distribute the same to consumers through such pipe. This right is not disputed by defendant. Hence the defendant, because of the limited

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character of the privileges conferred by ordinance 11,358, and the provisions of section 951 of the Revised Statutes, has no right to lay pipe in the streets of St. Louis through which to distribute gas to be used for light. And its attempts so to do are such an interference with and invasion of plaintiff's rights as to entitle plaintiff to the injunction asked and granted in this case. And this right of plaintiff to the relief granted rests upon grounds entirely distinct from the additional claim that plaintiff's charter confers upon it the exclusive right to manufacture and vend gas for light in said city. — *St. Louis R. R. Co.* v. *Northwestern St. Louis R. R. Co.*, 69 Mo. 71; *Jersey City Gas Company* v. *Dwight et al.*, 29 N. J. Eq. 242; *Raritan and Del. Bay R. R. Co.* v. *Del. and R. Ca.*, 3 C. E. Green (N. J.), 546; 8 C. E. Green (N. J.), 411; 1 C. E. Green (N. J.), 321–378; *Atlantic and Pacific R. R. Co.* v. *City of St. Louis*, 66 Mo. 256, 257; 1 Dill. on Mun. Corp. (3d ed.), sect. 89, p. 115; *Illinois Can. Co.* v. *City of St. Louis*, 2 Dill. C. C. 70; *Davis, etc.*, v. *Mayor of New York*, 14 N. Y. 500, 517, 520, 521–524; 27 N. Y. 618; 68 Mo. 115; *People's R. R.* v. *Memphis*, 10 Wall. 50 *et seq.* The charter of the plaintiff confers upon it the sole and exclusive privilege of manufacturing and of vending gas-lights in the city of St. Louis until the first day of January, 1890. And the acts done and threatened by defendant were an invasion and usurpation of this privilege which were not and could not be authorized either by defendant's charter or the ordinance of the city of St. Louis known as ordinance 11,358, or by both such charter and ordinance. — *Slaughter House Cases*, 16 Wall. 65, 66; *Crescent City Gas-Light Company* v. *New Orleans Gas-Light Company*, 27 La. An. 138; *City of Memphis* v. *Memphis R. R. Co.*, 5 Heisk. (Tenn.); *The State of Wisconsin* v. *Milwaukee Gas-Light Company*, 29 Wis. 454; Morawetz on Corp., sect. 431; *Moore* v. *Veazie*, 31 Me. 360; 32 Me. 343; 14 How. (U. S.) 568; *Binghampton Bridge*, 3 Wall. 51; *The*

State ex rel. Harris v. *Laughlin*, 75 Mo. 150; *Scotland Co.* v. *Mo., Iowa and Nebraska R. R. Co.*, 65 Mo. 135; *Home of the Friendless* v. *Rowse*, 8 Wall. 436, 437; *City of St. Louis* v. *St. Louis Gas-Light Company*, 70 Mo. 69; *St. Louis Gas-Light Company* v. *City of St. Louis*, 46 Mo. 121–123; Ang. & Ames on Corp. (11th ed.) 173, 174; *Robins* v. *Embry*, 1 Smed. & M. Ch. 268, 269 and 270; *Arthur* v. *Commercial Bank*, 9 Smed. & M. 394; *The Oakland R. R. Co.* v. *Oakland and Brooklyn R. R. Co.*, 45 Cal. 365, 378, 379; *National Bank* v. *Mathews*, 98 U. S. 621; *Piscataqua Bridge Co.* v. *New Hampshire Bridge Co.*, 7 N. H. 35; 2 Paige, 116; 6 Paige, 554; 1 Black, 358; 7 Cow. 33; 3 Wall. 210; 9 Ga. 517; 31 Miss. 679; 30 N. Y. 46; 2 Gray, 1; 17 Conn. 40; 8 Wall. 439; 69 Mo. 65; Gall. 429; 4 Fish. 50.

LEWIS, P. J., delivered the opinion of the court

The plaintiff was incorporated by an act of the General Assembly, approved February 4, 1837. Its charter, which is to continue in force for fifty years from the first day of January, 1840, contains the following provisions: —

"Sect. 22. The said company may also manufacture gas-fittings, portable gas vessels, and apparatus of all kinds appertaining to their business, and to sell the same, together with such inflammable gas as may be produced from oil, coal, tar, resin, pitch, wood, or other materials, or a combination of any such materials, in any manner hitherto used or hereafter to be used for the purpose; the gas to be furnished either by fixed burners, or in a portable and condensed state in vessels of suitable capacity and strength; also to vend coke, lime, ammoniacal liquor, tar or other substances, residuum in the process of generating and purifying the said gas.

"Sect. 23. That the St. Louis Gas-Light Company, their successors and assigns, shall have and be entitled to the sole and exclusive privilege of vending gas-lights and gas-fittings

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in the city of St. Louis and in its suburbs, to such persons or bodies corporate as may voluntarily choose to contract for the same.

"Sect. 24. That in order to enable the said company to carry the foregoing sections into effect, they shall be and are hereby authorized to lay pipes, conduits, or rails at the expense of the company, in any of the roads or in the avenues of the suburbs, or in any of the streets or alleys of the city of St. Louis, where the same may be required." * * *

By the terms of a contract entered into with the city of St. Louis on the 28th of February, 1873, "the St. Louis Gas-Light Company waives, abandons, and surrenders forever to the city of St. Louis, irrevocably, any and all claims and pretence of claims, of exclusive right to have gas-works, lay or have pipes and other appliances, vend or furnish gas, or do business as a gas company, in the following district or portion of said city, to wit:" Here follows a description of so much of the city as lies north of the south line of Washington Avenue, including all buildings fronting north upon the same south line.

The petition in this case charges, in substance, that the defendant corporation, having erected works for the purpose, announces and gives out that it intends to engage extensively in the business of making and vending, in every portion of the city, gas-lights and gas designed for illuminating uses; that it has laid pipes and made connections, and is engaged in extending the same, and in selling such gas-lights and gas, and is receiving compensation therefor. Plaintiff prays that the defendant may be restrained and enjoined, until after the first day of January, 1890, from further continuing to do any of these things in the district south of Washington Avenue. There was a hearing upon the pleadings and proofs, and a final decree granting the injunction prayed for.

The defence chiefly relied on assumes that the grant of

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·xclusive privileges contained in the plaintiff's charter was, and is, void; that it was in violation of existing constitutional limitations upon the powers of the legislative department, when the act was passed; and that, even without reference to such constitutional restrictions, the attempted grant was beyond the powers, as defined and understood in the necessities of civilized government, which a state may exercise over its citizens. If any one of these propositions may be sustained by judicial authority, and the defendant is in a proper position to claim its benefits, the judgment ought to be reversed.

On the threshold of our inquiry, we are met by a claim that the supreme court of this state has solemnly adjudicated and determined the validity of the grant in question. If convinced of this, we could only follow that adjudication, and affirm the judgment in the present case. But we think that the contrary is true.

The controlling authority over any court, of a judicial opinion delivered in another cause by its superior in appellate jurisdiction, rests upon the same solid foundation with the plea of *res judicata* and the doctrine of *stare decisis*, in cases to which they apply, and refers, generally, to the same tests for a determination of its efficacy in a given case. These all proceed upon the fundamental idea, that whatever has been once submitted to the thorough process of judicial investigation wherein each of the adverse parties, stimulated by interest in the result, and aided by all the resources from which light might come, has presented everything that could be urged in his own behalf, and thereupon an impartial arbiter has found and declared the true mean between the opposing forces, must have been properly determined if judicial methods are competent to such an end; and that it would be both useless and invidious to go over the same ground only to reach the same result. The conditions implied in this fundamental idea are indispensable in every application of the three instrumentalities referred to.

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The United States supreme court has always held that the construction of a state statute by the courts of the same state is, not merely persuasive but, controlling authority in the federal tribunals. This is quite as much as can be said of the authority of any appellate court over the rulings of its inferiors. Having in view this well settled law, the United States supreme court, in *Carroll* v. *Carroll* (16 How. 287), said: "If the construction put by the court of a state upon one of its statutes was not a matter in judgment, if it might have been decided either way without affecting any right brought in question, then, according to the principles of the common law, an opinion on such a question is not a decision. To make it so there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties and decide to whom the property in contestation belongs. And therefore this court (and other courts organized under the common law) has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties." To like effect are the remarks of Chief Justice Marshall in *Cohens* v. *The State of Virginia* (6 Wheat. 399): "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent; other principles, which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." In *Molony* v. *Downs* (8 Abb. Pr. 316), the conclusion reached by the court was not reconcilable with two cases cited in argument, which were supposed to be authoritative. Daly, J., quoted

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from a distinguished writer his definition of a precedent, as "a decision arrived at by a competent tribunal, after a patient inquiry into all points bearing upon the subject decided," and found that the cases cited did not come up to such a definition. He added: "After two days spent in the argument of this question by most able counsel, involving the examination of every authority bearing upon the question that diligence or acuteness could suggest, and giving to it such further research as the limited time afforded me would permit, I feel that I come within this learned civilian's requisition, and may assume the responsibility of refusing to adhere to, or be governed by, the authority of of a case where the point I am now required to pass upon was taken for granted without any examination, either upon principle or authority." This last quotation, however, seems to go a step farther than is required in the present case, and further, perhaps, than would be admissible if the supposed precedent fulfilled every other requisite, saving the one found wanting by the learned judge.

An inferior court is subordinate, only as respects the judicial decisions of its superior. Without such a qualification of authority, there would be no need for either brains or learning in any inferior tribunal. What constitutes a judicial decision, we have shown from very high authority. In the case of a direct mandate from a superior to an inferior court, the essentials of a judicial decision are necessarily and always present. Nothing less should be expected, when the authoritative utterance comes, not in the shape of a mandate, or at all in the cause wherein action is to be taken, but in the guise of an abstraction arising in the treatment of a different cause. In *Attorney-General* v. *Lum* (2 Wis. 514), a true distinction is clearly outlined thus: "It is not intended to be declared that all the reasoning and instances of illustration introduced into an opinion of this court are to be adopted by inferior tribunals from which cases or matters may come here by appeal, writ of error,

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or otherwise; but it is insisted and declared that the opinion of this court upon the points in judgment, presented and passed upon in cases brought here for adjudication, are the law of the land until overruled, or otherwise annulled, and that inferior courts and tribunals must yield obedience to the law thus declared."

The question before us is: Was it within the constitutional powers of the legislative department to grant the exclusive rights and privileges expressed in the plaintiff's charter? If there can be found a decision of our supreme court which has determined this question, then, according to the foregoing authorities (and all others on the same subject), there must have been in that decision an application of the judicial mind to this precise question, because it was necessary to determine it, in order to fix the rights of the parties and decide to whom the property (or right) in contestation belonged. It must also appear that the determination of this question was "a matter in judgment;" and that, in that case, this question was not one which "might have been decided either way without affecting any right brought in question." The decisions which are supposed to bear upon this matter are so utterly destitute of all these requisites, that it seems a waste of time to examine them. It would be a gross injustice to the court which rendered them, to assume that any one of its accomplished judges had this question at all present in his mind, or in any wise supposed that it was undergoing adjudication.

One of the cases is, *St. Louis Gas-Light Company* v. *City of St. Louis* (46 Mo. 121). There is no hint in that case of any question about the legislative authority to make the grant under consideration. The point of the decision was that, inasmuch as the plaintiff had practically claimed and enjoyed the exclusive privilege, as extending over the new city limits, it could not be now heard to deny that its corresponding obligations under the contract with the city were co-extensive with the same territory. It was sufficient

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that the plaintiff claimed to hold under the grant; and even this bald fact was not in controversy, but was admitted on all sides, for the purposes of the case. Nothing was said by anybody about the validity or invalidity of the thing claimed.

The other case is, *City of St. Louis* v. *St. Louis Gas-Light Company* (70 Mo. 69). In this, the grant in question is referred to for the purpose of showing that, inasmuch as it was intended to be a benefit to the gas-light company, and not as a right secured to the public, the grantee might surrender it, in whole or in part, without violating any duty. This, of course, would be equally true, whether the grant was valid or void. So that, if it could be made to appear (which it can not) that the question of validity in the grant was considered, there would still be no precedent, since that question might have been decided either way, without affecting the right then under examination.

The utmost that the plaintiff can claim for these decisions is, that they interpret the charter — not the state constitution. They find the legislature intended to vest in the plaintiff certain exclusive privileges, and "take it for granted" that the legislature might lawfully do so, because no one disputes it, and they have nothing to do with a question that is not in the case. Suppose a court to try a question of title which depends upon the interpretation of a deed. The effect of the deed is determined, judgment is rendered accordingly, and this judgment is affirmed on appeal. Afterwards, in another case, wherein other rights are controverted, the same deed is attacked as being absolutely void, for forgery, or other sufficient reason. Would it ever be pretended that the decision in the first case precluded the inquiry developed in the second? Such an inquiry in that case, would be an exact parallel with the one here before us. The question whether the legislature was constitutionally empowered to create the grant of exclu-

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sive privileges declared in the plaintiff's charter, is as freely open to our examination, as any question can be. We would, in our view, be recreant to the obligations of official duty, should we refuse to examine it by all the lights that may be thrown upon the way to justice between litigating parties.

The law-making power created by our state constitution has enacted in due form that the plaintiff shall have the exclusive right to manufacture and vend illuminating gas in the city of St. Louis, and to use the streets of the city for the accommodation of its pipes to be employed in conveying the manufactured article to consumers. The plaintiff has, practically, been in the actual enjoyment of this exclusive right for about forty-seven years. A proper and necessary comity between the different departments of the government would forbid any judicial interference with this enjoyment, unless such interference should be made necessary by some encroachment on adverse rights which the courts are bound to protect. There may be a question whether the present defendant is in a proper position to proceed against every feature of the privileges claimed. But, for the sake of logical arrangement, and for the purposes of the argument, we will here assume that the plaintiff's exclusive grant, in all its scope and tendencies, may be criticised in the present proceeding.

Article XIII., section 20, of the constitution of 1820, which was in force when the plaintiff's charter was passed by the General Assembly, declares: "That no title of nobility, hereditary emolument, privilege, or distinction, shall be granted." * * *

According to the usage of our language, if the particle *or* were inserted after the word *nobility*, the terms *privilege* and *distinction* would, like emolument, be qualified by the word *hereditary*. The omission occurs with the evident intent of the framers that no privilege should be granted, whether hereditary, or not.

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It may clear our way somewhat to note here two or three distinctions: The word *privilege*, though nearly allied with *right*, has yet its distinctive signification. A *right* is "that which justly belongs to any one." It may be held in common with others, or with all mankind. Every man has a right to life, to the air we breathe, and to other natural provisions for the benefit of humanity, until forfeited by crime, or surrendered to the demand of Omnipotence. But a *privilege* is defined to be "a right peculiar to some individual or body;" "a peculiar advantage or benefit." The word implies that some other individuals or bodies — perhaps all others — are denied participation in the right, advantage, or benefit. Hence, little or nothing is added to the force of the term by prefixing the word *exclusive*. The expression "sole and exclusive privilege" in the plaintiff's charter must be considered in this inquiry, with special reference, not to the permission given the plaintiff to do the things mentioned, but to the implied command that every other person, or corporation, shall refrain from doing any of those things. The manufacture of illuminating gas, and its sale, when manufactured, to any person or persons, may not be distinguishable, on any ground of natural right, from the manufacture and sale of shoes, or any other product of human industry. But an authority to lay and maintain pipes upon or under the public streets and highways, for facilitating a delivery of the article sold, can rest upon no such ground of natural right, where the absolute control and ownership of all highways is vested in the sovereignty of the state.

A natural person may of right do whatever is not prohibited by law. But a corporation, being an artificial or created person, may do nothing but what is expressed or implied in the words which give it being. Hence, the giving of power to a corporation, in its charter, to do certain things, does not of course imply that natural persons, or other corporations of like constitution, may not do the same

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things at pleasure, in the absence of a more definite prohibition. But a definite and natural prohibition always exists against the unauthorized use of that which belongs to another. From this it follows that, when a right belongs primarily and exclusively to the state, and is granted to a corporation or a natural person, no other corporation or person may exercise the same right, without a sufficient grant from the same proprietary source. This natural distinction lies at the foundation of all the authorities cited for the plaintiff in the present case in support of its first proposition, to wit: that the defendant is unwarrantably interfering with the plaintiff's franchise and should be restrained by injunction, even without any reference to the effect of the terms of exclusiveness contained in the plaintiff's charter. Their obvious application is confined to the use of the city streets for laying pipes.

The supreme court of Wisconsin says, in *The State* v. *Milwaukee Gas-Light Co.* (29 Wis. 454): "We had supposed the law to be quite well settled that the sovereign authority might grant special privileges to corporations and individuals, without violating any constitutional principle. It is frequently and constantly done by enacting various acts of incorporation of private companies for building and operating railroads, plank roads, ferries, and toll bridges, and for many other objects upon which private skill and capital can be employed." It might have been truly added that all such grants of special privileges have been generally sustained by judicial authority. At the same time the books abound in judicial denunciations of special or exclusive privileges, as "odious monopolies condemned by all free governments," as "destroying the freedom of trade, discouraging labor and industry, and contravening the equal right of all citizens to pursue a lawful occupation in a lawful manner," and as "against common right and void." The courts, then, have been warring against each other, and even against themselves, unless there may be found in cor-

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rect principles a satisfactory method of discriminating between the true and the false. Such a method should be alike applicable to the constitutional inhibition of 1820, above copied, and to the protective guaranties of *magna charta* and the common law against unjust and oppressive monopolies.

It is a familiar rule of statutory construction, that when a general provision is found to be in conflict with a special provision of limited application, the latter will prevail, and the general provision must yield. *The State* v. *DeBar*, 58 Mo. 395. The rule equally applies to the primary laws of human right, whether written or unwritten. It has a peculiar force when a general prohibition is antagonized by a positive and unquestionable right. "Thou shalt not kill." But that general command may be nullified by the positive right of self-preservation, when this demands the life of a murderous assailant. The right prevails over the prohibition, whether with or without statutory enactments. Effect is often given to the true principle by interpretation. Thus, when it was enacted in Bolognia, as Puffendorf says, that whoever drew blood in the streets should be punished with the utmost severity, the drawing of blood was finally interpreted not to mean the opening of his patient's vein by a surgeon, in pursuance of his humane right and duty. If this illustration may be considered, however, as addressing itself rather to the reasonableness of an interpretation, than to any other essential, it will fit our present purpose quite as well. Upon an examination of the various classes of exclusive privileges which have uniformly been sanctioned under free government, if we shall find them grounded, in every instance, on some natural right which no prohibitory authority may question, or which no reasonable interpretation will permit to be included in any terms of general denial, there will therefore be little difficulty in perceiving that the courts have not really disagreed about the nature and tendencies of exclusive privileges or monopolies, in

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their objectionable aspects, but have only been engaged in determining what were and what were not such. The tests they have recognized will easily show to which class the present plaintiff's grant belongs.

Proprietorship implies a right of alienation, in whole or in part, of the thing held, or of any use in or domination over it. The state, by right of eminent domain or otherwise, has a proprietary control over all highways, bridges, ferries, and other conveniences dedicated to the public use for travel or transportation. It may grant to any person or corporation a part of that control. Persons and corporations other than the grantee will have no benefit of the thing granted; but why? Simply because they are not named in the grant. The state imposes on them no privations or exclusions; it only ignores them. If the enjoyment be found exclusive, this belongs, not to the grant, but to an existing condition of things independent of the grant. The state, meanwhile, merely exercises its unquestionable right to select a transferee of that which it may transfer to whom it chooses. By no reasonable interpretation can this act be held within the meaning of an inhibition against the granting of exclusive privileges. The only exclusion operating against others than the grantee, in all such cases, is that universal law which forbids any man's usurpation of proprietary rights which have never reached him from the true source of title. These plain elementary principles furnish the key to a large array of adjudications referred to in *The State* v. *Milwaukee Gas-Light Co.* (*supra*), and others cited in the interesting brief of counsel for the present plaintiff.

The right of alienation implies a further right to annex terms and conditions to the operation of the grant. This principle fully justifies all those bridge and ferry franchises, wherein the sovereign grantor has stipulated against the use of like liberties by strangers, within a certain distance on either side of the authorized location. Such a

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stipulation, being within the powers committed to the state, and being included in the terms of a charter of incorporation, may acquire the force of an inviolable contract between the state and the corporation, whose obligation can not be impaired by subsequent legislation, without a violation of the federal constitution. *Binghampton Bridge Case*, 70 U. S. 51. All these incidents and effects, however evolved, rest at last upon the proprietary right of the state to bestow what no other may claim or hold without its consent. The right is none the less complete, because coupled with a trust for the public welfare and convenience. When duly exercised, with whatever accompaniments of exclusiveness against the world at large, "no one is wronged," says Judge Cooley, "when he is only excluded from that to which he never had any right." See also 6 Paige, 554; 2 Cow. 419; 7 Cow. 33.

Patents issued to inventors are sometimes referred to as grants of exclusive privileges. But there is no grant in the case. The inventor has a natural ownership in the product of his brain. The government confers nothing, but only protects him in the enjoyment of that which is already his. If the stranger is hindered by this protection, he is only hindered against invasion of another's right. In this case, also, he may be "excluded from that to which he never had any right," but is not, therefore, wronged. The protection of copyright stands upon the same footing of natural, positive, and impregnable right and ownership in the author or composer. Here, as elsewhere in the necessary disciplining of humanity, the civil law advances in aid of natural justice. It imposes no privation or exclusion upon any one, but holds all mankind to observance of the universal law which forbids the appropriation of another's property without his consent.

The state is specially charged with the preservation of the public health, morals, and safety. This great trust would be utterly barren, without a certain paramount right and

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authority vested in the state and known as the police power. The power thus entitled is found to be supreme over all rules of action, of whatsoever origin, whether mandatory or prohibitory, in civil administration. It stands upon a higher plane, even, than the state's normal control over highways. The latter was found in the *Binghampton Bridge Case* (*supra*), to be fettered in a measure by the inhibition in the federal constitution against a law impairing the obligation of contracts; so that a state could not resume its control over specific highway privileges, after having contracted them away to a corporation. But the same august tribunal has recently applied a contrary ruling to the police power, as exemplified in the celebrated *Slaughter House Cases* (83 U. S. 36). In the *Butcher's Union, etc., Co.* v. *The Crescent City, etc., Co.* (not yet reported), the United States supreme court holds that a contract whereby the state attempts to bargain away its police power in a certain particular is void as against a subsequent exertion of the same power in the same particular. The legislature of Louisiana had given to the Crescent City Company, in an act of incorporation, the exclusive right to have all live stock for slaughter, within certain territorial limits, landed and slaughtered at the stock-landing and slaughter-houses of the company. This act was sustained by the United States supreme court; a majority holding that it was a valid exercise of the police power, while four justices dissented, on the ground that it was void, as a monopoly and an unauthorized grant of exclusive privileges. Afterwards, a new state constitution was adopted, under whose authority "the municipal authorities of the city of New Orleans enacted ordinances, which opened to general competition the right to build slaughter-houses, establish stock-landings, and engage in the business of butchering in that city under regulations established by those ordinances, but which were in utter disregard of the monopoly granted to the Crescent City Company, and which in effect repealed the exclusive grant made to that

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company by the act of 1869." The Butcher's Union Company availed itself of these ordinances, whereupon the Crescent City Company obtained injunction, on the principal ground that the later grant of privileges impaired the obligation of its contract with the state under the act of incorporation. The United States supreme court directed a dismissal of the bill, denying that any contract obligation could operate to suspend the police power of the state. Says Miller, J.: "Nor does this proposition contravene the established principle that the legislature of a state may make contracts on many subjects which will bind it, and will bind succeeding legislatures for the time the contract has to run, so that its provisions can neither be repealed nor its obligation impaired. * * * The denial of this power, in the present instance, rests upon the ground that the power of the legislature intended to be suspended is one so indispensable to the public welfare that it can not be bargained away by contract. It is that well known but undefined power called the police power. * * * While we are not prepared to say that the legislature can make valid contracts on no subject embraced in the largest definition of the police power, we think that, in regard to two subjects so embraced it can not, by any contract, limit the exercise of those powers to the prejudice of the public welfare. These are the public health and public morals. The preservation of these is so necessary to the best interest of social organization that a wise policy forbids the legislative body to divest itself of the power to enact laws for the preservation of health and the repression of crime."

To this exposition of the transcendent efficacy of the police power nothing need be added to show that when acting within its legitimate sphere, and finding some grant or regulation of an exclusive and prohibitory character necessary to the due fulfilment of its purposes, it creates what might otherwise be denounced as an odious monopoly, the

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power is not to be impeded on any ground of general negation falling short of the highest public necessity. Private interest must in this, as in many other instances, give way, if need be, to that paramount concern for the public health, morals, and safety, in whose behalf civil governments are instituted. No general objections against legislation of any sort can prevail over this natural and unquestionable public right, and no interpretation of them can reasonably include it.

A franchise is a "privilege of a public nature, which can not be exercised without a legislative grant." *The State* v. *Weatherby*, 45 Mo. 20. It is "a special privilege conferred by government on individuals, and which does not belong to the citizens of a country generally, by common right." *Curtis* v. *Leavitt*, 15 N. Y. 170. The exclusive rights which we have been considering, thus far, may all be comprehended within these definitions. In every instance the right comes from the state and is available to the possessor, because the state was competent to bestow it; either by right of antecedent proprietorship, by its authority to protect a natural ownership with the aids of restrictive legislation, or by virtue of the absolute sovereignty residing in the police power. We may now consider those grants of exclusive privilege which are not franchises, but which, under the name of monopolies, are uniformly denied judicial toleration.

The right of property is one of those to whose protection the highest aims of government are directed. The right to labor for the production of property is no less fundamental and unassailable. "The right of property is equally invaded by obstructing the free employment of the means of production, as by violently depriving the proprietor of the product." Say's Pol. Econ. 133. Such rights require no grant from the sovereign, but are the common property of all citizens. "This equality of right, with exemption from all disparaging and partial enactments, in the lawful pur-

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suits of life, throughout the whole country, is the distinguishing privilege of the citizens of the United States. To them everywhere all pursuits, all vocations, all professions, are open without other restrictions than such as are imposed equally upon all others of the same age, sex, and condition." 83 U. S. 109. What, then, is the necessary effect, when the state undertakes to confer upon one person or corporation the sole and exclusive privilege of pursuing a lawful calling, labor, or occupation, in the manufacturing or selling of any commodity? The first visible effect is, that all persons, other than the grantee, are directly forbidden to pursue that calling, labor, or occupation. Here is no franchise within the definitions given. The privilege conferred and withheld is not one "which can not be exercised without a legislative grant," and it is one which does "belong to the citizens of a country generally by common right." The persons deprived are not in the situation of one who is "only excluded from that to which he never had any right." They have always been, and still should be, entitled, as of natural and unquestionable right. There is no granting of anything from the state's prerogatives; no protection given to an exclusive ownership already vested; nothing pretended to be done for preservation of the public health, morals, or safety. The act is sustained by no element of power confided to the government by constitutional or other authority, and comes within the technical definition of a monopoly. "A monopoly is defined to be an institution or allowance from the sovereign power of the state, by grant, commission, or otherwise, to any person or corporation, for the sole buying, selling, making, working, or using, of anything, whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty they had before, or hindered in their lawful trade. All such grants relating to any known trade or manufacture have been held by all the judges of England, whenever they have come up for consideration, to be void

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at common law, as destroying the freedom of trade, discouraging labor and industry, restraining persons from getting an honest livelihood and putting it in the power of the grantees to enhance the price of commodities." *Ib.* 102.

We have devoted so much space to elementary considerations, chiefly because we find ourselves compelled to observe a distinction which appears to have been passed over in the treatment of the case by the circuit court, and also in the arguments of counsel here. We do not perceive that the making and vending of illuminating gas is necessarily inseparable from the use of the public streets for its transmission through pipes. The very terms of the plaintiff's charter assert the contrary. The gas may be "furnished either by fixed burners or in a portable and condensed state in vessels of suitable capacity and strength." This contemplates an exclusive privilege of making and selling gas, independently of the use of the streets for laying pipe. To this is added an exclusive privilege of "vending gas-lights and gas-fittings in the city of St. Louis and its suburbs." In another section, the grantee is empowered to lay its pipes under the streets. Here are two distinct grants of privileges — one relating to the making and selling of commodities, and the other to the use of the highways. It may be that, practically, the possession of one of these will be of little commercial value without the other. But, when called upon to determine questions of legal right, we have nothing to do with comparisons of commercial values. It is doubtless possible for the defendant to make and sell its illuminating commodity, to some extent, at least, without using the streets for pipes. It may reach some customers through pipes laid on or under private property, and others by means of "vessels of suitable capacity and strength." The injunction as granted would prevent all this. A judicial decree in the premises should clearly define the rights of the parties, so that it may be perceived what obstacles are to be removed, in order to an

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enjoyment of all that they claim, and how they may proceed, if possible, without an invasion of the rights of others.

From what has been said, the conclusion naturally follows, that so much of the plaintiff's charter as attempts to grant an exclusive privilege of making or vending illuminating gas in the city of St. Louis is void, and can not be judicially enforced. No reasonable distinction can be entertained between illuminating gas, as an article of manufacture and trade, and any other commodity which people may purchase for their personal comfort or convenience. Such a distinction has never been judicially recognized, unless in its strict relation to the use of the public streets for conveying the article through pipes, or to the lighting of streets by municipal authority for the public benefit. So much of the charter as grants an exclusive right to use the streets of the city for the laying of pipes to convey illuminating gas was a lawful exercise of power vested in the general assembly and was and is effectual for the time being. Whether it must continue to be effectual under all circumstances until the expiration of the plaintiff's charter, depends upon other considerations.

As the case stands, we are not called upon to determine whether the grant concerning the streets was shaped into a contract from which the state can not recede, so as to bestow like privileges upon parties other than the first grantee. Adjudications are not wanting to the effect that grants strongly resembling that claimed by the plaintiff are lacking in the essentials of a contract, and whose tendencies suggest, at least, that the state might, through its municipal agencies, still assert its control over the streets to the extent of permitting a competitive enjoyment by another, of the same privileges conferred upon the plaintiff. *The State* v. *Cinn. G. L. Co.*, 18 Ohio St. 262; *The People* v. *Bowen*, 30 Barb. 24; *Norwich G. L. C. Co.* v. *Norwich City G.*

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Co., 25 Conn. 19; *Citizens' G. L. Co.* v. *Louisville G. Co.*, 2 Ky. Law Rep. 72; *Charles R. Bridge* v. *Warren Br.*, 36 U. S. 548. But until the state does so, if it may, the plaintiff will be entitled to protection by injunction against rivalry by any one who can not show an authority from the same sovereign grantor. *Jersey City G. Co.* v. *Dwight*, 29 N. J. Eq. 242; *Crescent City G. Co.* v. *N. O. G. Co.*, 27 La. An. 138; *Citizens' G. L. Co.* v. *Louisville G. Co.*, *supra*. The defendant, however, is not here in a position to make the first point just stated. As a corporation, it is competent, by the terms of its amended charter, to make illuminating gas, and to sell and deliver the same, through pipes or otherwise; but an appropriation of the highway to these purposes must derive authorization from another source. A corporation may be empowered by its charter to acquire and hold real estate, but when it would purchase under this power it must first find an owner consenting to sell.

An ordinance is shown (No. 11,358) adopted by the municipal assembly of the city of St. Louis, whereby the defendant has acquired "the right and privilege of laying pipe, with all necessary and proper attachments, connections and fixtures, below the surface of any of the public streets, alleys and highways within the corporate limits of the city of St. Louis, for the purpose of heating public and private buildings," etc. This gives no more authority to lay pipe for the purpose of lighting than for the purpose of conveying water or wine. All such grants out of the state's prerogatives must be strictly construed, and nothing may be added by implication. (See cases above cited.) The municipal corporation of St. Louis, as now constituted, is the constitutional representative of the state's sovereignty with respect to the streets and alleys of the city. It might, doubtless, exercise whatever power remains in the state to grant the privileges claimed by the defendant, but it has as yet, so far as appears, done nothing in that direction. As

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to the laying of pipe for lighting purposes north of Washington Avenue, all questions of right lie between the defendant and the city authorities. They do not concern the plaintiff or the present case.

The judgment of the circuit court is reversed. A final decree will be entered here, as follows: So much of the final restraining order of the circuit court as relates exclusively to the laying of pipe by the defendant in the streets, alleys and highways of the city of St. Louis, as designated, with the modifications and qualifications thereof made by a supplemental order, on February 1, 1884, will be repeated in the present decree. As to all other matters, the temporary injunction granted by the circuit court will be dissolved, and the prayer of the plaintiff denied. All the judges concur.

Lewis, P. J., delivered the opinion of the court on a motion for a rehearing.

We have carefully examined the motion for a rehearing, with the reasons in its support, filed by counsel for the appellant, but find in them no sufficient cause for relinquishing the views expressed in our former opinion, except as to the form of the decree which should be entered here. The restraining order of the circuit court, in so far as it relates to the laying of pipes in the streets, etc., will be modified, so as to restrain the defendant from so laying pipes for the purposes of conveying or vending illuminating gas, or gas to be used for lighting; but so as not to interfere with the defendant's right to lay pipes for heating purposes, as conferred by municipal ordinance of the city of St. Louis, No. 11,358. The motion for a rehearing is overruled, with the concurrence of all the judges.

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T. S. CUNNINGHAM ET AL., Respondents, *v.* E. WELLS ET AL., Appellants.

June 17, 1884.

NUNC PRO TUNC ENTRIES — BILLS OF EXCEPTIONS. — A *nunc pro tunc* entry of the allowance of a bill of exceptions can not be made at a subsequent term where no paper or memorandum in the cause shows the facts.

APPEAL from the St. Charles Circuit Court, EDWARDS, J. *Affirmed.*

HENRY R. WATSON, for the appellants.

C. DAUDT, for the respondents.

THOMPSON, J., delivered the opinion of the court.

This was an action of ejectment. The plaintiff had a judgment at the March term, 1882, and a motion for a new trial was made and continued until the following September term, 1882. At the September term the motion for a new trial was overruled. No entry of record was made of the signing of a bill of exceptions, either at the March term, or at the September term. At the September term, 1883, the defendants made a motion for the entry of an order *nunc pro tunc* as of the September term, 1882, allowing and signing their bill of exceptions. The court granted the motion as appears by an entry made upon the minutes of the court and copied into the transcript, and as also appears by a bill of exceptions to the order granting the motion taken by the plaintiff Daudt. This bill of exceptions recites the filing of the motion for the *nunc pro tunc* entry on the 22d of September, 1883; the appearance of the plaintiff Daudt for the sole purpose of objecting thereto; the overruling of his objections and his exception taken at the time. The bill of exceptions thus taken by the plaintiff Daudt thus

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recites: "And the court then and there, without any other evidence being submitted to said court except the bill of exceptions signed by the judge of said court of blank date sustained the motion for a *nunc pro tunc* entry," etc. The defendant's bill of exceptions, as incorporated into the transcript does not show the date at which it was allowed and signed by the judge, nor does it give any intimation thereof, either in its caption or in its conclusion. It shows that the proceedings, from the commencement of the trial down to and including the filing of the defendant's motion for new trial, took place at the March term, 1882. It also shows that the motion for new trial was overruled, "on the day of , 1882," but the concluding part of the bill of exceptions contains no statement of the date at which it was allowed and signed.

It thus appears that the judge made this entry *nunc pro tunc* from his own recollection of what had taken place at a term a year before. In the language of the supreme court in a recent case, "this it was not competent for him to do, on a motion, *nunc pro tunc*, at a subsequent term. The record and entries before him certainly do not show the facts. Unless the facts do in some way appear by the record, or some entry or paper in the cause, *nunc pro tunc* entries are not allowable. They can not be made from outside evidence, or from facts existing alone in the breast of the court, at a subsequent term." *Belkin* v. *Rhodes*, 76 Mo. 643, 650. It is clear, therefore, that the defendants' bill of exceptions can not be considered, as there is no competent evidence of record that it was allowed and signed at a term of court at which it could be allowed and signed by law. Even if the bill itself had shown the date at which it was signed this would not have been sufficient. An entry by the clerk on the record showing the fact that it had been allowed would have been necessary; for this is held to be what the statute means in requiring the bill of exceptions to be "filed." *Fulkerson* v. *Houts*, 55 Mo. 301; *Johnson*

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v. *Hodges*, 65 Mo. 589; *McGrew* v. *Foster*, 66 Mo. 30; *Pope* v. *Thomson*, 66 Mo. 661. As no ground of error is suggested, except such as is raised by this bill of exceptions, the judgment must be affirmed. It is so ordered. All the judges concur.

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JULIA SHARKEY, Appellant, *v.* THOMAS McDERMOTT, ADMINISTRATOR, Respondent.

June 17, 1884.

1. **EQUITY — ADOPTION — PARENT AND CHILD — ORAL CONTRACTS. — After the death of a husband and wife, equity will not give effect to an oral promise by them to adopt the plaintiff as their child.**
2. **—— MARRIED WOMEN. — After the death of a married woman, equity will not give effect to her oral promise, made during coverture, to adopt a child.**
3. **—— An adopted child of the husband does not by reason of such adoption become the heir of the wife.**
4. **—— An oral contract which will operate after death as a disposition of the estate must be such as was mutually enforceable during the lives of the parties.**
5. **—— The performance of such a contract by the claimant must have been in sole consideration of the contract and have been referable to no other consideration.**

APPEAL from the St. Louis Circuit Court, BARCLAY, J. *Affirmed.*

M. F. TAYLOR and F. M. ESTES, for the appellant: There may be an adoption by parol. — *Hill* v. *Goumel*, 1 Beav. 541; 53 Iowa, 146; 25 Ga. 612. An intended contract, ineffectual as such by reason of some formal omission required by law, may generate an estoppel when a manifest fraud would result from treating the whole transaction as wanting in validity. — Big. on Estop. 489–492; *Dukes* v. *Spangler*, 35 Ohio, 126; *Jeffers* v. *Philo*, 35 Ohio, 173; *Sutton* v. *Hayden*, 62 Mo. 101; *Gupton* v. *Gupton*, 47 Mo. 37. The defendants being

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privies of Catherine McLaughlin are estopped to deny that plaintiff was legally adopted.— *Van Dyne* v. *Vreeland*, 3 Stockt. 370; *Van Dyne* v. *Vreeland*, 12 N. J. Eq. 142.

BROADHEAD & HAEUSSLER and C. V. SCOTT, for the respondent: Adoption must be by formal deed.—Rev. Stats., sects. 559–601. Courts of equity can not dispense with the regulations prescribed by statute; otherwise equity would, in effect, defeat the legislative enactment.—Story's Eq. Pl., sects. 96–170; *Long* v. *Hewitt*, 44 Iowa, 363; *Houck* v. *Bates Co.*, 61 Mo. 391. The alleged promise, if made, was the agreement of James McLaughlin solely; Catherine, a married woman, was incapacitated in law to contract in the respect alleged, and any promise by her, as alleged, being void, no ratification was made when discovert.— *Kernan* v. *Martin*, 8 Mo. 698; *Musick* v. *Dodson*, 76 Mo. 627. Any right of action plaintiff might have had at the death of James McLaughlin, in 1876, is barred by laches and the statute; when the facts disclose laches the court will refuse relief.—*Kelley* v. *Hurt*, 74 Mo. 561; *Godden* v. *Kemnen*, 99 U. S. 211; *Sullivan* v. *Railroad Co.*, 94 U. S. 807

THOMPSON, J., delivered the opinion of the court.

I. The respondent makes the point at the outset, that there is nothing before the court to consider, because the motion for new trial was not made within four days after the entry of the judgment. No motion for new trial is necessary to raise the question upon which our judgment is invoked, whether the petition states a cause of action, which question is presented by what is termed the record proper. Besides, the bill of exceptions states that the motion for new trial was filed within four days of the judgment; and this, although contradicted by the clerk's minute entries copied into the transcript, is controlling. *Bank of North America* v. *Fletcher*, 15 Mo. App. 272.

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II. The question for consideration arises upon a demurrer to the following petition: —

"Plaintiff states that Thomas McDermott is the administrator of the estate of Catherine McLaughlin, deceased, duly qualified and now in the discharge of his duties as such; that defendants Margaret and Charles Mileham are husband and wife; that defendants Andrew and Mary Hanson are husband and wife, and defendants Thomas and Annie McDermott are husband and wife, all of said defendants living together as husbands and wives as aforesaid; that the other defendants and this plaintiff are the only heirs at law of the said Catherine McLaughlin, deceased, as well as of her late husband, James McLaughlin.

"Plaintiff further states that the said Catherine died heretofore, to wit, on or about the 15th day of January, 1883, leaving a large estate situated in the city of St. Louis, State of Missouri, and consisting of both personalty and realty, which she took under the will of her husband James McLaughlin, deceased; that said Thomas McDermott has in charge such of the personalty as has been discovered, and also is, by order of the St. Louis probate court, collecting the rents of the real estate. Plaintiff further states that, when she was an infant of about the age of four years, and to wit, on or about the first day of January, 1862, said James and Catherine McLaughlin took this plaintiff from her mother's care, her father having previously deceased, and placed her in their household, promising plaintiff's mother that they would provide and care well for her, and adopt her as their child, and leave her their property at their death. That from that time on until the death of the said James, to wit, about the year 1876, this plaintiff continued to reside in their household, was told by said James and Catherine that she was their legally adopted child, and would inherit their property; that so soon as she was large enough to work she was put out at service in a

store in the city of St. Louis, all of her wages being collected and appropriated by said James and Catherine; that she yielded a willing obedience to the said James and Catherine under the impression that she was their legally adopted child; that after the death of said James, and the publication of his will, it was ascertained that he had willed to this plaintiff one-half of his whole estate, but afterwards, by codicil, revoked the bequest, leaving his entire estate to the said Catherine, the property so willed being all that the said Catherine died seized and possessed of; that plaintiff was informed by the said Catherine, and avers the fact to be, that said codicil was written because the said James feared that, becoming independent by reason of said bequest, plaintiff might refuse to longer recognize the relationship of adopted child, and leave the household and society of the said Catherine; that, after the death of said James, plaintiff still continued under the same conditions to live in the household of the said Catherine; that she was by the said Catherine held out to the world as her adopted child, and was by said Catherine repeatedly told that she was her legally adopted child, and would inherit, by reason thereof, all of her property. Plaintiff further states that the defendants were all of age prior to the death of said Catherine, and all resided in the city of St. Louis, Missouri, and were visitors at the house of said Catherine, and had full knowledge of the relationship existing between said Catherine and plaintiff, and were frequently told that plaintiff was her adopted child, and the expectations of plaintiff the defendants acquiesced in and acknowledged. Plaintiff states that, after the death of said James, she still continued in said service in a store in the city of St. Louis aforesaid, the said Catherine receiving and appropriating all of her wages; that she also did all of the sewing and other household labor for said Catherine, and continued to live with and serve said Catherine, discharging for her all of the duties commonly discharged by a child for its parent; that from the time she

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first began to work in a store, as above mentioned, until the death of said Catherine, she earned as wages the full sum of $5,000, all of which was received and enjoyed by said James and Catherine, and that her services in the household were worth more than the board, lodging and clothing given her; that she rested secure during all of said years in said relationship, yielded all of the affection and obedience due from a child to a parent, at all times supposing from the statements of the said James and Catherine that all legal requirements had been complied with, and that she was their legally adopted child and heir; that of the said sum of money so received from her labor as aforesaid, $2,500 came into the hands of and was appropriated by said Catherine after the death of said James.

"Plaintiff further avers that said Catherine was seized with a spasm and died suddenly while plaintiff was engaged in attending to her duties as saleswoman as aforesaid, never speaking after she was taken with said spasm, and that, after her death, it was found that she died wholly intestate, and plaintiff then, for the first time learned upon investigation that no formal statutory deed of adoption was upon record as provided by law, and as to whether any deed was ever formally executed plaintiff has now no means of knowing; that when she was taken as aforesaid into said household she was of too tender an age to require a formal deed, and, after growing older, trusted entirely to the statements of the said James and Catherine that said requirements had been complied with, and did not know anything to the contrary.

"Plaintiff further states that the defendants, as heirs at law, and as administrator of said Catherine, now deny her right to said property as the adopted child of said Catherine; deny that the facts and circumstances herein before detailed constitute any reason why she should be held and considered as an adopted child, or that said property, both real and personal, should be turned over to her, and

threaten to take and appropriate the estate of said Catherine to themselves.

"Plaintiff alleges that, after having contributed the earnings of the best years of her life and a long service at home to the said James and Catherine during their lifetime, under the conviction that she was their adopted child, and that she would receive from them their property at their death, to be now deprived of the fruits of such adoption and the benefits of said estate to which she has herself contributed, and to be set aside and debarred from sharing the estate of said Catherine as if adopted, and to be deprived of the large sum of money received by the said James and Catherine on account of her services, as aforesaid, would be a gross fraud and great hardship, and that, in equity and good conscience she is entitled to be treated in the distribution of said estate, and by the heirs at law of said Catherine, none of whom are her children, as though a formal deed of adoption had been signed and recorded as provided by law.

"Wherefore plaintiff prays that a decree be herein entered establishing her right of adoption, and declaring her the heir at law by virtue of the adoption of the said Catherine, and the heir at law by reason of the said premises, and for all other and further relief as the facts in the case may warrant and the court deem proper."

We are of opinion that the circuit court rightly sustained the demurrer to the petition. It will be perceived, that in substance it invokes the aid of a court of equity to establish by parol evidence an agreement by which it is alleged that James and Catherine McLaughlin promised to adopt the plaintiff as their child and heir at law. It seeks this relief after both of the parties who are alleged to have made this promise have died. It seeks it seven years after James McLaughlin died, the plaintiff having been, at the date of his death, eighteen years of age, and capable of bringing her action then. So far as the petition attempts to found a right of action upon any promise made by Catherine

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McLaughlin while under coverture, it is bad; because it is settled in this state that a married woman can make no contract except where some enabling statute empowers her to do so; that a promise made by her is a nullity; and that it does not even furnish a consideration for a subsequent promise made by her after she becomes discovert. *Musick v. Dodson*, 76 Mo. 624. There is no averment in the petition that Catherine McLaughlin ever made a promise to adopt the plaintiff after Catherine McLaughlin became discovert by the death of her husband. On the contrary, the petition indicates that both Catherine and the plaintiff supposed that she had been formally adopted; so that, whatever foundation the petition affords for the relief sought must be predicated upon the alleged promise of James McLaughlin to adopt the plaintiff.

Our statute (Rev. Stats., sects. 599–601) has provided a mode by which any person may adopt "any child or children as his or her heir or devisee." This is to be by deed duly executed and recorded, as in the case of a conveyance of real estate. By section 600, a married woman may make such an adoption by joining in such a deed with her husband. The rights acquired by the adopted child are thus stated in section 601: "From the time of filing the deed with the recorder, the child or children adopted shall have the same right against the person or persons executing the same, for support and maintenance and for proper and humane treatment, as a child has, by law, against lawful parents; and such adopted child shall have, in all respects, and enjoy all such rights and privileges as against the persons executing the deed of adoption. This provision shall not extend to other parties, but is wholly confined to parties executing the deed of adoption." Although section 599 speaks of adopting the child as his or her heir or devisee, yet it is obvious from the whole statute taken together, that it was not intended to place an adopted child upon a better footing in respect of inheritance than a natural lawfully begotten

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child would occupy. Suppose then, that James McLaughlin had, in his lifetime, fulfilled his alleged promise of adopting the plaintiff, would it have prevented him from thereafter devising his property to his wife to the disinheritance of this plaintiff? Assuredly not. To hold otherwise would not only place an adopted child in a better position than a real child of the parents, but it would operate to release an adopted child from one of the strongest motives of filial obedience, and deprive the adopting parents of one of the most effective means of enforcing obedience. If then, a court of equity could place the plaintiff in the position in which, according to her petition, James McLaughlin promised to place her, what would that position be? It would simply be the position of a daughter disinherited first by her father, and afterwards by her mother, asking a court of equity to make for her a will which neither her father nor her mother had made for her.

Suppose she had been adopted by James McLaughlin; if he had died intestate she would have been his heir. But would an adoption by James McLaughlin without the concurrence of Catherine McLaughlin make her Catherine McLaughlin's heir? Can a man by adopting the child of another change the statute of descent and distribution in respect of his wife's property? It seems unnecessary to ask such a question. In many cases, courts of equity will give effect to agreements imperfectly executed, or resting only in parol, where they have been in part performed; but it is well settled that such courts will not in this way aid the defective execution of a power created by statute. The reason is that for them to do so would defeat the very policy of the legislative enactment. 1 Story's Eq. Jur., sect. 177; *Houx* v. *County of Bates*, 61 Mo. 391; *Long* v. *Hewitt*, 44 Iowa, 363. Although this rule may not be of universal application, yet it would be difficult to suggest a case which calls more strongly for its application than the case before us. If such a court could, after a husband and wife are both dead, give effect to a parol promise made in

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their lifetime to adopt a child as their own, it could, upon the same principle, break into the statute of wills; a will could be made for an intestate decedent by parol evidence. The party who alone is able to testify as to the real intent being dead, a will could be readily manufactured for him by perjured testimony as to oral declarations or promises made in his lifetime, and all certainty in the devolution of the property of deceased persons would be at an end.

But if such extraordinary relief as is asked in this case could have been afforded against James McLaughlin, in case he had died intestate, it would still be impossible for the plaintiff to have any relief, because her entire claim for relief is predicated upon the idea that, in some way, she is entitled to be regarded as the adopted daughter of Catherine McLaughlin, deceased. Now, James McLaughlin devised all his property to his wife, Catherine McLaughlin. We have already said that, if the plaintiff had been formally adopted as his child, by deed, this would not empower a court of equity to set aside his will for the purpose of enabling her to inherit from him, because such a court could not do that if she were his real child. We have already pointed out, that even if she had been adopted by him, this would not make her the heir of his wife, Catherine McLaughlin. It thus appears that, in order to grant the extraordinary relief which is here claimed, we should have to go to the length of holding, not only that a court of equity can make a deed of adoption for a man after he is dead, but that it can make such a deed for a married woman after she is dead. The general rule is that a married woman can make no deed except where she is empowered to do so by statute; and except in the manner in which the execution of such power is prescribed by statute. This is very familiar law. If a married woman were to make a thousand parol promises to A, founded upon the most meritorious consideration, to make a deed of her property to him, a court of equity could not make such a deed for her, because

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this would be in contravention of the statute which has prescribed the manner, and the only manner, in which she can make a conveyance of her real property. For the same reason, the law having empowered Catherine McLaughlin to adopt this plaintiff in one way, namely, in the way pointed out by section 600 of the Revised Statutes, it is too clear for debate that a court of equity could not, if she were living, and for stronger reasons can not now that she is dead, make such a deed for her, or make a decree which shall have the same effect as such a deed.

None of the decisions to which we have been referred by the learned counsel for the plaintiff in support of the proposition that there may be an adoption by parol supports that proposition, and only one of them refers to the question at all, namely, *Tyler* v. *Reynolds* (53 Iowa, 146–150), where the proposition was not decided, but was said to be "perhaps doubtful at least." In that case there was a statute like ours, which provided the manner in which a person might adopt the child of another, namely, by a deed, duly executed, acknowledged and recorded. The court held that the provision that the deed should be recorded was essential to its validity, and, this not having been done, disregarded the equities of the child, notwithstanding she had entered into the family of the person who intended to adopt her, and had been openly acknowledged to the world as their adopted child. In so holding, the Iowa court followed their previous decision in *Long* v. *Hewitt* (44 Iowa, 363). In this last case, the instrument intended to effect the adoption of an infant had been signed and acknowledged by his surviving parent, but the persons intending to adopt him had failed to execute it by reason of the illness of the justice of the peace in whose possession it had been left. It was held, disregarding the equities of the child, who had resided with the intended parents a year and a half, that there had been no legal adoption. The court proceeded upon the ground that, while equity will

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interfere to correct the defective execution of a power, yet it has no jurisdiction to relieve parties from the effects of a failure to execute, even though the intention to do so may be apparent; and further, that they can not aid the defective execution of a power created by statute. "The statute," said Rothrock, J., "provides what shall be necessary to be done in order to confer upon the child all the rights and privileges and responsibilities which would appertain to the child if begotton (to the adopting parents) in lawful wedlock. Courts of equity can not dispense with the regulations prescribed by statute; for otherwise equity would in effect defeat the very policy of legislative enactments. * * * If courts of equity should hold that an inquiry may be made as to what were the causes which prevented a compliance with the statute by the proper execution of an agreement for adoption, it would be a most dangerous doctrine, and would be in effect permitting that which the statute requires should be in writing to be shown by parol; thus allowing estates to be distributed upon what might be shown by parol to have been the intention of the intestate." *Ibid.* 367.

Some observations ought to be made upon the case of *Van Dyne* v. *Vreeland* (11 N. J. Eq. 370; *s. c.* 12 *Id.* 142), which has been pressed upon our attention. In its facts that case was much like the facts set up in the petition in the case at bar; and it was held that a court of chancery had power, the adopting father living, to set aside a fraudulent conveyance of his property made with the intention of defeating his engagement to leave all his property to the adopted son, although the contract of adoption was by parol merely; and the court proceeded upon the ground, which clearly appeared, that the contract had been completely executed by the complainant, the adopted son, which took it out of the statute of frauds. But a striking distinction between that case and this is that there was no statute in New Jersey providing for the formality of a recorded deed

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in order to the validity of an adoption, as there is in this state. Moreover, several successive wills had been made by the adopting father, in pursuance of his engagement with the adopted son, in which he had described him as his adopted son. These wills, although revoked by subsequent ones, might be regarded, in so extreme a case, as memoranda in writing signed by the party to be charged, such as would take the case out of the statute of frauds. It is further to be observed that this decision is that of a single judge, Chancellor Williamson, and not that of a court of appeal; and while the learned judge appears to have considered the question very thoroughly, it is not necessary for us to say whether, in the absence of any statute relating to the adoption of children, we should regard it as a sound decision. I feel disposed to place it, where the supreme court of Iowa placed it, in the category of doubtful decisions; and this, notwithstanding the learned chancellor, in his second opinion (12 N. J. Eq. 144) expressed the opinion that all the essential grounds of his first opinion had been approved by as eminent an equity judge as Lord Langdale, M. R., in *Hill* v. *Gomme* (1 Beav. 540). It does not seem necessary to consider at length the decision of Lord Langdale in that case; because, admitting it to have been well decided, it is no authority for what the plaintiff contends for in this case. The contract between the father of the child and the adopting father in that case was by deed, and there was a present consideration of £100 paid by the former to the latter. Nor does it appear that there was in England any statute prescribing the formalities essential to a valid adoption of a child, such as exists in this state. Moreover, the decision was against the claim set up by the adopted child, on the ground that the contract had been revoked by the original parties to it, namely, the father and the adopting father; and the observations of Lord Langdale as to what his decision would have been if the adopted child had lived long enough with the adopting father to form

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expectations in life which ought not to be disappointed, were *obiter dicta* merely, though, of course, entitled to much respect, coming from a judge of such experience and reputation.

Nor is it necessary to dispute the proposition that there may be a valid engagement even by parol, made by persons living, a consideration having passed, which will operate as a disposition of the estate of one of them after his death. The decision of Lord Romilly, M. R., in *Ridley* v. *Ridley* (34 Beav. 478), lends the weight of the opinion of a very experienced equity judge to this proposition. Great difficulty, however, attends the admitting of such a principle, where such an engagement is sought to be enforced respecting land, and where, as in the case at bar, regard is had to the statute of frauds. Where such an engagement is by parol, it would seem on principle that two things must concur in order to entitle the plaintiff to relief: 1. That the contract was such a contract as could have been specifically enforced by the alleged adopting parent against the alleged adopted child and his real parents while the alleged adopting parent lived. 2. That the performance of the contract by the child and by his real parents was a performance with sole reference to the contract, and that the acts set up as performance were not acts which might, in whole or in part, be referable to some other circumstance or consideration.

This will appear from a recent judgment in the English court of appeal, in a case where the following facts appeared: The plaintiff, as heir at law of an intestate, claimed the title deeds of his farm, of which the defendant had taken possession at his death. The defendant set up, by way of counter-claim, that she was entitled to a life estate in the farm, and to retain the title deeds for her life. The jury found that the defendant had been induced to serve the intestate as his housekeeper without wages for many years, and to give up other prospects of establishment in life, by

his promise, which was a verbal one, to make a will leaving her a life estate in his farm, if and when it became his property. The court of appeal held, reversing the judgment of Mr. Justice Stephen, that neither the continuance of the defendant in the service of the intestate, nor the fact that he had executed a document which he intended to operate as a will in the defendant's favor, but which failed to take effect for want of proper attestation, was any evidence of a sufficient part performance of the parol agreement between the plaintiff and defendant, such as would take it out of the fourth section of the statute of frauds. In so holding, Bagally, L. J., speaking for the court, said: "It is a well recognized rule that if, in any particular case, the acts of part performance of a parol agreement as to an interest in land are to be held sufficient to exclude the operation of the statute of frauds, they must be such as are unequivocally referable to the agreement. In other words, there must be a necessary connection between the acts of part performance and the interest in the land which is the subject-matter of the agreement. It is not sufficient that the acts are consistent with the existence of such an agreement, or that they suggest or indicate the existence of some agreement, unless such agreement has reference to the subject-matter. As was said by Lord Hardwicke in *Gunter* v. *Halsey* (Ambler, 586), they must have been such as could have been done with no other view or design than to perform the agreement. Thus payment of a part, or even of the whole of the purchase-money, is not sufficient to exclude the operation of the statute, unless it is shown that the payment was made in respect of the particular land which is the subject of the parol agreement. On the other hand, the admission into possession of a stranger is, speaking in general terms, a sufficient part performance, for it is not explicable upon any other supposition than that it has resulted from the contract in respect of the land of which possession has been given. Again, the continuance in pos-

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session of a tenant is not of itself a sufficient part performance of a parol agreement for the purchase from the landlord, for it is equally consistent with a right depending upon his tenancy. Let us, then, apply this text to the acts of performance relied on by the defendant in the present case. They are limited to her continuance in the employment of Thomas Alderson until his death without being paid the wages due to her in 1860, and without receiving any remuneration for her subsequent services. It can not with any show of reason be contended that such continuance in his service was referable only to an agreement that he would leave her a life estate in his property, or, indeed, that it was referable to any agreement whatever. Other considerations for the continued service suggest themselves, and, in particular, that to which we have already referred as having been suggested by the plaintiff in argument, that the defendant had been induced to continue in the service of Thomas Alderson by an expectation, founded possibly upon a representation made by him of his intentions, of some future benefit to be derived under his will, should she continue in his service. The circumstance that Alderson subsequently executed a document which he intended to operate as a will in the defendant's favor, carries the case no farther; it is as consistent with the previous expressions of intention as it is with his having previously entered into an agreement, and it is equally consistent with his never having done either the one or the other. For the reason that there is not in the present case any evidence of a sufficient performance of the parol agreement upon which the defendant's counter-claim is based, to exclude the operation of the statute of frauds, we are of opinion that the plaintiff's appeal should be allowed." *Alderson* v. *Maddison*, 7 Q. B. Div. 174. The learned justice, speaking further for the court, also expressed the opinion that the contract, assuming it to have been made, was one which could not have been enforced by either party to it during the life of

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Thomas Alderson. "As regards the obligation upon the defendant, it was a contract for personal services, for the specific performance of which a decree could not be obtained, though in some cases, as in that of *Lumley* v. *Gye* (2 El. & Bl. 216), a court of equity would restrain by injunction the doing of an act contrary to the terms of the agreement, and in that way obtain in substance a performance of it. Nor could a court of equity, any more than a court of law, compel a man to make a will in accordance with any promise or agreement previously entered into by him. * * * It appears to us that to give the same effect to a man's promise or agreement to make a will, as to a will made by him in pursuance of such promise or agreement, would be in direct contravention of the provisions of the statute."

This was a very recent case, decided in the year 1881. So far as we know, it is the only decision by an English court of appeal bearing upon the question before us. It is to be perceived that the party who claimed the benefit of such an agreement failed, notwithstanding her case rested upon clearer grounds than the case at bar. She continued for several years in the service of a man without compensation; but, nevertheless, this was held not sufficient evidence of part performance of the agreement set up by her to take the case out of the statute of frauds, because her so continuing in his service was not necessarily referable to such an agreement. So, in the case at bar, the plaintiff continued in the service of Mr. and Mrs. McLaughlin during the entire period of her minority after the age of four years, and in the service of Mrs. McLaughlin for a number of years thereafter. But it is quite plain that her so continuing in their service is not necessarily referable to an agreement that she should be adopted as their heir at law and have the property of Mr. McLaughlin at his death. It is just as consistent with an agreement on their part to raise and educate her, and with the feeling of affection and

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filial obedience which she must have acquired for them during the long period in which they acted as her foster parents. Then, notwithstanding the decision of Chancellor Williamson, in *Van Dyne* v. *Vreeland* (*supra*), it is not clear that such a contract is one which is capable of specific enforcement under any circumstances. If the English court of appeal laid down the correct doctrine in *Alderson* v. *Maddison* (*supra*), it was not such a contract. Suppose the plaintiff had run away from Mr. and Mrs. McLaughlin on attaining the age of fourteen years, could they have reclaimed her custody and compelled her to live with them and render obedience and service to them? It is clear that they could not. The law does not give such a power to a father over his own child. It is quite clear, then, that the agreement set up in this petition was not such an agreement as a court of equity could have enforced specifically against the plaintiff at the suit of James McLaughlin in his lifetime, or Catherine McLaughlin after his death. Nor does it appear upon what principle the plaintiff could have had a specific enforcement of it in the lifetime of either James or Catherine McLaughlin. Upon what principle could she claim the specific enforcement of a contract as against them, which from its nature, they could not have specifically enforced against her? But it is perceived that this is just what the plaintiff is asking us to do, after the death of Catherine McLaughlin, and more than seven years after the death of James McLaughlin. Nor is it enough for her case that we should enforce an alleged parol contract of adoption. That, as we have seen, will not make out her case; for by adopting her, James McLaughlin did not oblige himself to make his will in her favor. We must go further, and enforce a parol promise on the part of James McLaughlin to make a will in her favor; but when was it ever decided that equity would compel specific performance of an agreement to make a will? There is no such thing known to the law as a parol will, with the isolated and narrow exception of a nuncupative will, and it is a well settled principle of

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law, applied in England and America, that a nuncupative will, though valid to pass the personal estate of the decedent, is not valid as a devise of his real estate. But here, not even the formality surrounding a nuncupative will is claimed, — no testamentary announcement made to witnesses by a party *in extremis*, no reduction to writing of such testamentary announcement by such witnesses, and no exhibition and proof of the testament thus made for the purpose of probate.

It seems not necessary to pursue this subject further. The doctrine of estoppel is appealed to. This doctrine, it must be admitted, is sometimes carried to great length for the purposes of justice. Nor is it denied that it operates against privies in blood and estate, and that if it could have been invoked against James and Catherine McLaughlin while living, it can be invoked in respect of their real property against their heirs at law. But whatever may be said concerning this doctrine, it is clear that it can not be invoked for the purpose of overturning the whole policy of legislation touching the devolution of real property and of the estates of deceased persons.

The judgment of the circuit court is affirmed. All the judges concur.

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JAMES R. HOLT, Respondent, v. W. J. SIMMONS ET AL.; A. JUDLIN, Appellant.

June 24, 1884.

1. **PARTNERSHIP — EQUITY. — A proceeding for the settlement of partnership affairs between the copartners and between the firm and its creditors is a proceeding in equity.**
2. **—— REFEREES — PRACTICE. — The findings of fact of a referee upon the claims of firm creditors in a partnership settlement proceeding are subject to review, both by the trial court and by the appellate court.**
3. **—— TRADING FIRMS — IMPLIED POWERS — COMMERCIAL PAPER. — A manufacturing partnership firm which buys and sells is a trading firm, and**

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one partner has the implied power to borrow money on the firm credit and to issue commercial paper therefor, in the firm name.

4. —— He who has knowledge that one partner has executed a firm note with the consent of his copartner may assume that such partner has the power to execute and negotiate commercial paper in the firm name.

5. —— NOTICE. — Commercial paper issued for value in the firm name, after the firm's dissolution, by one party without the other's consent, is good, in the hands of the payee who had no notice, actual or constructive, of such dissolution.

6. —— MORTGAGE — PLEDGE. — In the absence of fraud of the mortgagee or pledgee a partner may bind the partnership by the pledge or mortgage of firm personalty for business purposes of the firm and within the scope of the partnership business.

7. —— AGENCY. — In pledging or mortgaging firm personalty, for firm purposes and within the scope of the business by one partner, he is presumed to act as the agent of his copartner with respect of the latter's share or interest.

APPEAL from the St. Louis Circuit Court, LINDLEY, J.

Reversed and remanded with directions.

DYER, LEE & ELLIS, for the appellant: It is a legal consequence in every commercial partnership — every partnership engaged in buying, selling or exchanging, that each partner is the general agent of the firm; and has power to act for it and bind it in all matters within the scope of the partnership business, and it is within the scope of such business to borrow money, to draw money, accept, or indorse bills of exchange or promissory notes. These are the means of conducting such business, and they are common alike to all partnerships engaged in the sale of merchandise. — *Wagner* v. *Simmons*, 61 Ala. 146; *Howze* v. *Patterson*, 53 Ala. 205; *Pohlman* v. *Taylor*, 75 Ill. 629; *Zuel* v. *Bowen*, 78 Ill. 324; *Johnson* v. *Barry*, 95 Ill. 483; *Leffer* v. *Rice*, 44 Ind. 103; *Faler* v. *Jordan*, 44 Miss. 283; *Porter* v. *White*, 39 Ind. 613; *Hoskinson* v. *Elliott*, 62 Pa. St. 393; *Roney* v. *Buckland*, 4 Nev. 45; *Ford* v. *McBride*, 45 Texas, 498; *Smith* v. *Collins*, 115 Mass. 388; *Dowe* v. *Moore*, 47 N. H. 419; *Silverman* v. *Chase*, 90 Ill. 37; *Wells* v. *Miller*, 66 N. Y. 255; *Ditts* v. *Lonsdale*,

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44 Ind. 521; *Johl* v. *Fernberger*, 10 Heisk. 37; 1 Am. Ld. Cas. 442; *Hunt* v. *Clarke*, 56 Ala. 19. The implied authority of a partner having power to borrow money to pledge the personal property of the firm for money borrowed is beyond dispute. — 1 Lindley on Part. 285, and cases cited. One partner has power without any special authorization for that purpose to execute a mortgage on the personal property of the partnership to secure all partnership debt. — *Keck* v. *Fisher*, 58 Mo. 532; *Flanagan* v. *Alexander*, 50 Mo. 50. A trading copartnership is one in which the business thereof, according to the usual mode of conducting it, imports in in its nature the necessity of buying and selling; and such a copartnership is invested with all the powers and subject to all the obligations incident to a trading partnership. — *Kimbro* v. *Bullitt et al.*, 22 How. (U. S.) 256; *McGregor* v. *Cleveland*, 5 Wend. 475; *Winship Bank* v. *U. S.*, 5 Pet. 529; *Baker* v. *Wheeler*, 8 Wend. 505; *Coles* v. *Coles*, 15 Johns. 160; *Johnson* v. *Dutton*, 27 Ala. 245; *Hedley* v. *Bainbridge*, 3 Q. B. 321; *Cagill* v. *Cosby*, 15 Miss. 425.

A. MOORE BERRY, CHAS. B. STARK and THOS. METCALFE, for the respondent: Persons who, with knowledge of the character and scope of a partnership business, deal with one partner, do so with notice of the limitations which the nature and customs of that business place upon the power of each partner to bind the firm. — Pars. on Part. 99; *Pooley* v. *Whitmore*, 10 Heisk. 638. Persons who deal with a partner are bound to know the extent of his authority. — *Davis* v. *Richardson*, 45 Mo. 510; *Waller* v. *Keys*, 6 Vt. 257; *Prince* v. *Crawford*, 50 Miss. 358; *Cocke* v. *Bank*, 3 Ala. 180. The power of one partner to bind his copartner by the execution, in the firm name, of negotiable paper, is confined strictly to trading or commercial partnership. — *Davis* v. *Richardson*, 45 Miss. 508; *Smith* v. *Sloan*, 37 Wis. 285; *Prince* v. *Crawford*, 50 Miss. 344; *Hunt* v.

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Chapin, 6 Lans. 139; *Gray* v. *Ward*, 18 Ill. 33; *Deardorf* v. *Thacher*, 78 Mo. 128 (advance sheet); *Third National Bank* v. *Snyder*, 10 Mo. App. 211; *Graves* v. *Kellenberger*, 51 Ind. 66; *Cocke* v. *Bank*, 3 Ala. 178; *Judge* v. *Braswell*, 13 Ky. (Bush) 75; *Hedley* v. *Bainbridge*, 3 Ad. & El. (N. S.) *321; Story on Part., sect. 102*a*; Pars. on Con. 208. Neither partner in a non-trading firm has any implied power to bind his copartner by negotiable notes signed in the firm name.—*Third National Bank* v. *Snyder*, 10 Mo. App. 211, and authorities cited; *Deardorf* v. *Thacher*, 78 Mo. 128. To constitue a custom or usage of a firm, both partners must be cognizant of the course of dealing; the habit of one partner to execute or indorse negotiable paper is not, of itself, sufficient to bind the copartners on the ground that such was the custom or usage of the firm.—*Andrews* v. *Bank*, 7 Smed. & M. 192–196; *Prince* v. *Crawford*, 50 Miss. 359. The mere fact that the money borrowed by one partner has been in good faith applied to partnership purposes is not sufficient to render the firm liable to repay it if there was no actual or implied authority to borrow, and there has been no ratification of the loan.—Collier on Part. 666, citing *Galway* v. *Matthews*, 10 East, 264; *Bannister* v. *Morris*, 6 Exch. 796; *Picketts* v. *Bennett*, 4 C. B. 686; *Hawtayne* v. *Bourne*, 7 M. & W. 595.

THOMPSON, J., delivered the opinion of the court.

This is a suit brought by one partner against his copartners and the firm creditors for the purpose of winding up the concern. There was an injunction, which was afterwards dissolved except as to defendant Simmons, who was the plaintiff's copartner. By consent of parties a referee was appointed "to take proof, audit and allow or reject all claims of the defendants and all others," against the firm, and to "adjust the partnership accounts as between plaintiff and defendant Simmons, partners in said late firm."

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The referee heard the parties and filed an elaborate report, stating certain general conclusions of fact and of law, and then passed specifically upon each claim.

The only question which arises upon this record relates to the claim of the defendant Asbury Judlin, upon a promissory note for $400, which, together with two other notes held by the defendant Delchanty, had been secured by a chattel mortgage of all the tangible assets of the firm. The plaintiff Holt resisted the allowance of this claim, on the ground that the note and the mortgage securing it had been given by his copartner, the defendant Simmons, after the dissolution of the partnership, without the plaintiff's knowledge, consent, or authority, express or implied. The referee found that this defence had been made out and rejected the claim, including the mortgage, which of course fell with the note.

The referee based his conclusion upon certain findings of fact, which will be set out. The plaintiff argues that, in respect of this claim, the case is to be deemed an action at law, and that the findings of the referee are therefore conclusive, there being substantial evidence to support them. We do not understand that this is an action at law. We understand that this is a well recognized proceeding in equity, known in the English chancery practice as a "winding up bill," the general purpose of which is to wind up and settle affairs of an insolvent partnership, not only as between the firm and its creditors, but as between the partners *inter se;* that, according to the English chancery practice, those having claims against the firm intervene *pro interesse suo* before a master, who hears proof and passes upon their claims, his findings being subject to review by the court upon exceptions, both as to law and fact. By anology to this practice, the claims in this case were sent to a referee; and we understand that, upon exception to his conclusions of fact, the court will re-examine the same upon the testimony reported by him, just as in the corre-

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sponding proceeding in chancery, and overrule his findings, if contrary to a clear preponderance of evidence.

With this understanding of the practice we have looked carefully through the record and have come to the conclusion that the following findings of the referee are well supported by the evidence: That the plaintiff and the defendant Simmons became partners in business on the 28th of October, 1879, under the firm name and style of the Simmons Refrigerator Company; that their agreement of copartnership was in writing; that it expired by limitation on the 28th of October, 1880, and that they ceased to be partners on that day; that the business conducted by them as copartners was the manufacture and sale of refrigerators, ice boxes or coolers, and butcher boxes, and the fitting up of saloons with counters, shelving, sinks, and perhaps some other appliances used in saloons; that the nature, scope, and character of the business thus conducted by them as copartners was known to the defendant Judlin, at or before the time when the debt was contracted, which forms the basis of his claim; that Simmons contributed to the capital of the concern a lot of stock, manufactured goods, contracts for work, and also his personal services and skill, and that Holt contributed cash from time to time amounting in the aggregate to more than $3,000; that Simmons assumed the active management of the business, and that Holt became the office man and book-keeper of the concern; that on or about October 28, 1880, the date at which the partnership expired by limitation, the firm closed its office and salesroom at No. 1222 Olive Street, where the firm name had hitherto appeared on the window and on the sign over the door, and removed all its stock to a place on Twelfth Street, about two or three blocks further over, which place had been used as a factory by them, but which had no sign to indicate to the public by whom, or what business was done there; that after this removal to the place on Twelfth Street, the stock was stored away at such place, a room was then

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fitted up with a stove and office desk, and that some material on hand, which otherwise would have been valueless and lost, was worked up into two or three ice-boxes, which work occupied about the first three weeks of November, 1880, and was the last work done by the firm; that at this time the stock on hand belonging to the firm was worth about $1,800, and the indebtedness of the firm, exclusive of claims which are contested by the plaintiff Holt, amounted to about $250 or $300; that during the months of November and December, 1880, and January, 1881, Simmons employed men and did some work at this place on Twelfth Street on his own account, of a character similar to the work which had been done by the firm; that neither at the dissolution of the copartnership on the 28th of October, 1880, nor afterwards, was any public notice of that fact given by publication or otherwise, except by closing the office and sales-room of the firm on Olive Street, which had been their usual place of business; that the defendant and claimant Judlin had dealt with the firm before its dissolution, but had no special or personal notice of its dissolution at or before the time when he executed the note which is the foundation of his claim.

As to the nature of the claim of the defendant Judlin, the following findings of fact were made by the referee, which we are of opinion were well supported by the evidence: That the claim of this defendant consists of a note purporting to have been made by the said partnership firm, the Simmons Refrigerator Company, on the 29th of January, 1881, payable to the order of this claimant, for the sum of $400; that it was executed by Simmons in the firm name after the dissolution of the firm and without the knowledge or consent of Holt; that it was given in lieu of another note for the same amount, payable to the order of the same claimant, dated January 5, 1881, which last named note had also been executed by Simmons in the firm name without the knowledge or consent of Holt; that the note of

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January 29, 1881, as well as that of January 5, 1881, was given to this claimant as collateral security for a note for the same amount dated January 5, 1881, payable ninety days after date, executed by this claimant in favor of the Simmons Refrigerator Company, and delivered to Simmons, who indorsed the firm name thereon and procured it to be discounted, realizing therefor the sum of $400 less the usual bank discount; that this note, executed by the claimant in favor of the Simmons Refrigerator Company, was given to him by the claimant for the purpose of enabling him to raise money, and not for any debt owing from the claimant to the partnership; that when this note fell due it was paid by the claimant, and that the claimant has never been repaid the amount which was thus loaned to Simmons in the name and on the credit of the firm; that the negotiation of this loan by Simmons in the name of the firm by means of getting the claimant's note was done without the knowledge or consent of Holt, who first learned of the transaction and of the giving of the firm note which is the basis of this claim and of the mortgage securing the same at or about the time this suit was commenced; that neither the negotiation of this loan in the firm name, nor the execution of the note which is the basis of this claim therefor, has ever been in any way ratified or confirmed by Holt.

Upon the question whether the money thus raised by Simmons was used by him in payment of debts due by the firm, or whether it was appropriated by him to his own private purpose, there is a sharp conflict of testimony between him and the plaintiff Holt. The referee finds that there is a preponderance of testimony in favor of the conclusion that the money was not used in the course of the business of the firm. We think that we can not interfere with this finding. The conduct of Simmons in the transactions and other matters which were disclosed on his cross-examination impress us with the belief that he is not a creditable witness; while there is nothing in the record to create such

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an impression concerning the testimony of Holt. We accordingly hold that the referee was right in finding in favor of the facts stated by Holt, that none of this money was used for the firm. The fact is, the whole transaction was concealed from Holt by Simmons and Judlin said nothing to him about it, although Judlin had met Holt more than once thereafter, for more than a month, and this, notwithstanding a chattel mortgage of the entire stock of the partnership had been executed by Simmons in the name of the firm, to secure this note and two other notes in favor of the defendant Delehanty, amounting in the aggregate to $662.

The propriety of the conclusion of the referee that this claim ought to be rejected will depend upon the soundness of other conclusions of fact and of law, upon all of which the referee made distinct findings. One of these was that neither of these partners had express authority to bind the firm by the borrowing of money and the issuing of negotiable paper. Of this there is no question. Another is that there was no evidence before the referee in respect of any usage or custom of similar copartnerships as to borrowing money or executing or negotiating notes and bills. This conclusion is equally unquestioned. No such evidence was offered. A third is, that in order to carry on the business of the firm in the usual and ordinary way, there was no necessity, either of borrowing money or of negotiating notes and bills. In view of other findings of the referee, we think that this last conclusion may be doubted. The referee has found, upon undoubted testimony, that the firm did on several other occasions borrow money and issue negotiable notes; that on May 12, 1880, Simmons having first obtained the consent of Holt, procured four notes which had been made payable to the firm to be discounted, realizing for the firm the sum of $287.50. The referee has found that this was done for the purpose of increasing the capital of the concern, and not from any necessity existing at the time, growing out of the usual and ordinary course

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of the firm's business. We may add that this finding is in conformity with the testimony of Holt. We think that it is quite immaterial whether the discounting of paper by a firm is said to be done for the purpose of increasing its capital or for the purpose of meeting some necessity growing out of the usual and ordinary course of the firm's business. Assuming the note to be good, such a discounting would not increase the capital of the firm, but would diminish it by the amount of the discount. Then, as to the necessity of doing it, the fact that the partners did it is the best evidence that it was deemed necessary to do it, in order to increase their stock of ready money; and we may add that the fact that they took the notes to a broker instead of offering them to a banker in the usual course of business, was a circumstance which a business man would regard as strong evidence that they were in need of money at the time. The referee has also found that, on July 7, 1880, a note payable to the firm was discounted by this claimant Judlin, with the consent of both partners, realizing for the firm the sum of $98.50, which amount was entered by Holt upon the cash-book of the firm as the amount of the previous discount had been. The referee also finds that, at still another time, Simmons gave the firm note for $110, for a bill of lumber and reported the fact to Holt, who remonstrated with him for signing a note without the knowledge of him, Holt; which note was paid at maturity. The referee also finds on the books of the firm, of date August 21, 1880, an entry of $85, borrowed money, which money was borrowed by Simmons and reported to Holt and which was handed back by Holt to Simmons three days afterwards, to be repaid. The referee also finds that there was another entry on the books of the firm of $95, borrowed money, $50 of which was borrowed of one Hudson by Simmons without the previous knowledge or consent of Holt, and $10 of which was borrowed of Julian, another claimant, at Holt's suggestion, and repaid on the same day. The referee

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finds that there were no other occasions where money was borrowed on the credit of the firm, or where notes were negotiated in the name of the firm, with the previous consent or subsequent assent of both partners; and that, in every other instance where Simmons borrowed money or negotiated notes in the name of the firm, it was done without the knowledge or consent of Holt, from whom Simmons concealed the fact, Holt not learning of the transactions until after the dissolution of the copartnership and until attempts had been made to collect the sums so borrowed. The testimony of Simmons is quite inconsistent with these findings, and discloses several additional instances where money was borrowed for the firm, one of which was the borrowing of $100 by Holt from Mr. Scruggs. Indeed, the testimony of Simmons would make it appear that the firm was constantly in difficulties about money, continually putting off bills, and that Simmons was frequently driven to the necessity of running from place to place to borrow money, sometimes taking Holt with him. Taking the whole testimony together, and especially the above findings of the referee, we are clear that it does not sustain his conclusion that in order to carry on the business of the firm in the usual and ordinary mode, there was no necessity of borrowing money or of negotiating notes and bills. On the contrary, we regard the testimony as clearly leading to the conclusion that there was such a necessity. This leads us to consider another finding of the referee, which he has placed among his findings of fact, namely, that this firm was not a commercial or trading partnership, within the meaning of the terms "commercial" or "trading," as applied to partnerships. This finding might be regarded as involving a mixed question of law and fact, if the facts in relation to the character of the firm were in controversy; but as such facts are not here in controversy, we must regard it as no more than a statement of a conclusion of law; and the referee has repeated substantially the same finding among his conclusions of law. Whether this is a sound conclusion has been justly regarded

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by the counsel for the opposing parties as the chief question in the case.

The principles which apply in cases like the one stated are entirely settled. Those principles have been nowhere better expressed than by Chief Justice Marshall in the following language: —

"Partnerships for commercial purposes, for trading with the world, for buying and selling from and to a great number of individuals, are necessarily governed by many general principles, which are known to the public, which subserve the purposes of justice, and which society is concerned in sustaining. One of these is that a man who shares in the profits, although his name may not be in the firm, is responsible for all its debts. Another, more appreciable to the subject under consideration, is that a partner (certainly the acting partner) has power to transact the whole business of the firm, whatever that may be, and consequently to bind his partners in such transactions as entirely as himself. This is a general power, essential to the well conducting of business, which is implied in the existence of a partnership. When, then, a partnership is formed for a particular purpose, it is understood to be in itself a grant of power to the acting members of the company to transact its business in the usual way. If that business be to buy and sell, then the individual buys and sells for the company, and every person with whom he trades in the way of business has a right to consider him as the company, whoever may compose it. It is usual to buy and sell on credit; and if it be so the partner who purchases on credit in the name of the firm must bind the firm. This is a general authority held out to the world, to which the world has a right to trust. The articles of copartnership are, perhaps, never published. They are rarely, if ever, seen except by the partners themselves. The stipulations they may contain are to regulate the conduct and rights of the partners as between themselves.

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The trading world, with whom the company is in perpetual intercourse, can not individually examine those articles, but must trust to the general powers contained in all partnerships. The acting partners are identified with the company, and have power to conduct its usual business in the usual way. This power is conferred by entering into the partnership, and is, perhaps never to be found in the articles. If it is to be restrained, fair dealing requires that the restriction should be made known. These stipulations may bind the partners, but ought not to affect those to whom they are unknown, and who trust to the general and well established commercial law." *Winship* v. *Bank of U. S.*, 5 Pet. 529, 561.

The difficulties which arise in cases like the one at bar relate to the application of this well understood principle; and here, without going to the trouble of citing cases, it may be said that the decisions of the courts justify the following conclusions: 1. That where the partnership is a trading or commercial partnership, the law implies a power on the part of the active or managing partner to emit, accept, or indorse negotiable paper in the name of the firm. 2. That, although the firm may not be what is known as a commercial or trading partnership, yet if in the transaction of its business it was customary for it to emit, accept, or indorse negotiable paper, the act of an active or managing partner in emitting, accepting, or indorsing such paper in the name of the firm, will bind the firm. 3. That although neither of these conditions exists, yet if a general usage or custom on the part of partnership firms engaged in a like business to emit, accept, or indorse negotiable paper be shown, an implication will arise that an active or managing partner of such a firm has power to bind the firm in this way. 4. And that in all these cases, any person dealing with the firm has a right to assume that such power on the part of an active or managing partner exists, unless he has notice that such power does not exist.

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The articles of copartnership of the Simmons Refrigerator Company were silent upon the question of the power of the partners to bind the firm by emitting, accepting, or indorsing negotiable paper; but it does not follow that, because such power was not conferred by the articles upon the partners, it did not in fact exist; because, according to the principle of commercial law as above stated by Chief Justice Marshall, each partner being an active partner, had impliedly the power to do in the name of the firm whatever was necessary, according to the usual course of business, for carrying on the business of the firm. It may not be really necessary for the purposes of this case to determine whether a manufacturing partnership is a commercial or a trading partnership within the rule which empowers an active partner to bind the firm by emitting, accepting, or indorsing negotiable paper; because in this case it was clearly shown, according to the facts found by the referee, to have been the practice of the firm to do this through the defendant Simmons, who was the active or managing partner. But as observations were made by this court in *Third National Bank* v. *Snyder* (10 Mo. App. 211, 216), which are supposed to give countenance to the doctrine that an active or managing partner of such a firm has no such implied power, we think it proper to express a clear and unequivocal opinion upon this question; because we think that the question is of such importance that the commercial and banking community ought not to feel that the courts have any doubts upon it. What we held in this last case was, that a partner in a firm of brokers, who were mere negotiators, and whose business required neither capital nor credit, had no such implied power. For the purpose of showing how far the courts had gone in denying such implications of power, we also gave a catalogue of several kinds of business in which the courts had held that there was no legal implication of such a power. Among these were milling, publishing, and sugar refining, which are undoubtedly in a

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sense manufacturing. But we expressed no opinion whatever except upon the precise question before us.

Whether a manufacturing partnership is to be deemed a trading or commercial partnership within the meaning of this rule, is a question upon which there can be no doubt, if the test laid down by Chief Justice Marshall in the language above quoted is to be considered a correct test. That test is, whether the business of the partnership was to buy and sell; if it was, then, since buying and selling are usually done on credit, an implication of power on the part of one active or managing partner to buy or borrow on the credit of the firm necessarily follows; and since in the ordinary course of commercial transactions, money is raised and debts are acknowledged by the emitting, accepting, or indorsing of commercial paper, an implication of the possession of this power by such a partner equally follows.

That this is the correct view clearly appears from a later decision of the supreme court of the United States than the one above quoted. *Kimbro* v. *Bullitt*, 22 How. (U. S.) 256. In this last case Mr. Justice Clifford, after clearly laying down the general principle of law applicable to the implied power of partners, proceeded to inquire to what kinds of partnerships the implication of power above stated extends; and he concluded by laying down this principle: "Whenever the business, according to the usual mode of conducting it, imports in its nature the necessity of buying and selling, the firm is then properly regarded as a trading partnership, and is invested with all the powers and subject to all the obligations incident to that relation." In the former of these cases (*Winship* v. *Bank of U. S.*, *supra*) it was held that the active or managing partner of a partnership whose business was the manufacture of soaps and candles, possessed, by implication of law, such a power; and in the later case (*Kimbro* v. *Bullitt*, *supra*) the precise question was whether the managing partner of a firm organized for the purpose of forming and operating a steam

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saw-mill had such an implied power; and it was held that, although such a partner in a firm organized for the mere purpose of farming would not have such a power, yet the circumstance that the business of the firm included the operating of a steam saw-mill made it a commercial or trading partnership, and raised an implication of such a power. "They were also engaged," said Mr. Justice Clifford, "in running a steam saw-mill for manufacturing purposes; and common observation will warrant the remark that those who engage in that business always want capital to carry it on, and frequently find it necessary to ask for credit. Like those engaged in other branches of manufacture, they buy and sell and have occasion to remit money and collect it from distant places."

Decisions of the supreme court of the United States on questions of commercial law are very high and persuasive authority. The two decisions above quoted from are distinct authority for the proposition that an active or managing partner in a firm whose business is manufacturing has implied power to bind the firm, by emitting, accepting, or indorsing negotiable paper; and this for the reason that buying and selling is necessary to the carrying on of the business of such a firm in the ordinary way. Aside from the authority of the court which has thus twice announced this rule, we are entirely satisfied that the rule is well founded in principle and is universally regarded as the law and acted upon by the commercial community. Indeed, we can see no difference in respect of the necessity of buying and selling, of having capital and of dealing upon credit, between a partnership engaged in general merchandising, and a partnership engaged in manufacturing. The former buys goods and sells them again for a profit either with or without breaking bulk; the latter buys raw materials, changes their character by expending labor and skill upon them and again sells them for a profit. In the latter case equally with the former buying and selling are an essential part of

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the business; and we can not understand what difference exists between the two kinds of business in respect of the ordinary mode of conducting them which would furnish a sound basis for implying this power in respect of a partnership of the former kind and denying it in respect of a partnership of the latter kind.

But in the case at bar it was also shown as a fact that money was borrowed for the use of the firm with the consent of both partners; that, with the like consent, commercial paper belonging to the firm had been negotiated, and that, with like consent, notes had been given, executed by Simmons in the same way in which the note in question was executed. Nay, it appeared that such a note had, on a previous occasion, been given to the claimant Judlin for an advance of money used in the firm business, by the consent of both partners. Under these circumstances, it is quite clear that Judlin had a right to assume that such a power on the part of Simmons existed.

At the time when the note in question was executed by Simmons to Judlin, the partnership had expired by limitation and was in fact dissolved; but no pains had been taken by Holt to give the general public any notice of this, or to convey any substantial notice of it to the persons with whom the firm had had dealings, of whom Judlin was one. The case, therefore, stands exactly as though the firm had not been dissolved at the time; and if Holt is obliged to pay a debt contracted by his partner Simmons in fraud of his rights, it must be imputed to his own negligence that he left it in the power of Simmons thus to defraud him. Of course, Judlin would not have advanced his money (or what was in substance the same, his negotiable note) to Simmons for the supposed accommodation of the firm, if he had known or supposed that the firm was in fact dissolved. Judlin having made this advance to Simmons upon a negotiable obligation of the firm and under circumstances which made it the debt of the firm, it was wholly

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immaterial, so far as his rights were concerned, whether the money was subsequently applied by Simmons for partnership purposes or for his own private purposes. That was something beyond his control, and with which he had nothing to do.

The only remaining question relates to the validity of the chattel mortgage which was given to secure this four hundred dollar note of Judlin and two notes of Delehanty to the aggregate amount of $662. The well settled rule under this head is, that every partner in ordinary cases, and in the absence of fraud on the part of the purchaser, has a complete *jus disponendi* over all the partnership personalty. He possesses full power and authority to sell, pledge, and otherwise dispose of the entirety or any part of the goods, wares, merchandise, or other personal effects belonging to the firm, and not merely his own share thereof, for purposes within the scope of the partnership. In respect of the shares of his copartners, he is deemed to do such acts as their agent and as the accredited representative of the firm. Each partner is treated without any nicety of discrimination, and is deemed to possess a dominion over the entirety of the property, and therefore clothed with all the ordinary attributes of ownership. Story on Part., sect. 95; *Keck* v. *Fisher*, 58 Mo. 532; *Clark* v. *Rivers*, 33 Mo. 579. The four hundred dollar note given by Simmons to Judlin, being a valid partnership indebtedness, the mortgage of partnership effects given to secure the same must, in conformity with this principle, be held equally valid. Judlin in his answer does not ask for any relief in respect of this mortgage, but he has gone before the referee with other creditors and proved up his claim, under a general order of the court, and has shown that his claim is a secured claim. In the distribution of the assets in case there should not be enough to pay all the claims, he will therefore be entitled to the preference which his mortgage gives him.

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The judgment will be reversed and the cause remanded to the circuit court, with directions to enter a judgment in favor of the claimant Asbury Judlin for the amount of his note, interest and costs, to be paid out of the assets of the partnership in the hands of the receiver, in preference to the other claims, except that of the defendant Delehanty secured by the same mortgage. It is so ordered. All the judges concur.

JOHN N. STRAAT, Respondent, v. GEORGE RINKLE, JR., Appellant.

June 24, 1884.

HOMESTEAD — APPRAISEMENT — EXECUTION — MOTION TO QUASH. — Proceedings under a levy and appraisement having been suspended by the sheriff to await the action of the court in proceedings under section 2698 of the homestead act, such appraisement is not conclusive on the defendant who can show all the facts in the proceeding under said section, and a motion to quash the execution on the ground that the appraisement is erroneous is properly overruled.

APPEAL from the St. Louis Circuit Court, LUBKE, J. *Affirmed.*

W. B. THOMPSON, for the appellant: The appraisement of homesteads under execution in all collateral proceedings is conclusive. — Thompson on Homesteads, sect. 657; *Hunt* v. *Lauck*, 38 Cal. 372; *Colby* v. *Crocker*, 17 Kan. 527; *Bartholomew* v. *Hook*, 23 Cal. 277; *M'Laughlin* v. *Hart*, 46 Cal. 639; *Brown* v. *Cozard*, 68 Ill. 180; *Barney* v. *Leeds*, 54 N. H. 142, 128; *Casebolt* v. *Donaldson*, 67 Mo. 308. The acts of the sheriff under the execution were without authority of law, and the violation of the statute. — Sects. 2690, 2691, Rev. Stats.; *Deveraux* v. *Fairbank*, 50 Vt. 700; *Lamb* v. *Mason*, 50 Vt. 345; *Skouten* v. *Woods*, 57 Mo. 380. And hence the motion to

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quash the execution should have been sustained.—*Bain* v. *Chrisman*, 27 Mo. 293; *Parker* v. *Waugh*, 34 Mo. 340; *Bruce* v. *Vogel*, 38 Mo. 100; *Parker* v. *Railroad Co.*, 44 Mo. 415; *Gale, Admr. of Maupin*, v. *Michie*, 47 Mo. 326.

JOHN N. STRAAT, *pro se.*

THOMPSON, J., delivered the opinion of the court.

This appeal is prosecuted from an order of court overruling the defendant's motion to quash an execution sued out against the defendant by the plaintiff and levied upon real estate of the defendant. The grounds of the motion are an alleged erroneous and void appraisement under the statute relating to homesteads. It is claimed that the defendant claimed a homestead in the land levied upon; that appraisers were appointed by the sheriff who made an erroneous valuation, leaving out of consideration two mortgages, and found that the improvements and ground were worth more than the amount allowed as the homestead by the statute, and that the building was not susceptible of the division. The sheriff, on the making of this appraisement, suspended action under the levy, and, on the 15th of September, 1883, before the return of the execution, the plaintiff filed a petition under section 2698 of the Revised Statutes praying for an order of sale of the premises and for an apportionment of the proceeds of such sale between the parties entitled to the same. On the 1st of October, 1883, the sheriff returned the execution, together with the report of the appraisers as follows: "I did not advertise and sell the real estate levied on under this execution before the return day thereof, for the reason that George Rinkle, junior, the defendant therein, claimed a homestead in the premises as No. 1 herein of said levy as above described in the return on said execution, which claim of said defendant necessitated the appointment of commissioners to appraise and set out such homestead; that such commissioners were duly appointed and duly qualified and made report that the

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premises in which said defendant claimed a homestead were not susceptible of the division, for which reason they could not set out such homestead. The action required to be taken by either party under section 2698, chapter 9, of 'Homesteads,' Revised Statutes 1879, in cases where homesteads are claimed, and commissioners report the premises not susceptible of division has not been reported to me up to this date, October 1st, 1883, for which reason I retain this execution." On the 11th of October, 1883, the plaintiff filed an amended petition under section 2698 of the Revised Statutes praying for the same relief as in his original petition. On the 15th of November, 1883, the defendant filed an elaborate answer to this amended petition, and thereafter, on the 16th of November, the plaintiff by a reply, traversed the new matter in the amended answer. We do not gather from the record the date at which the motion to quash this levy and appraisement was filed, except that it was at the October term, 1883, and was therefore subsequent to the date of the sheriff's return above quoted from, which was made on the 1st of October. This motion to quash came on to be heard on the 19th of November, 1883, which, it will be perceived, was after the issues in the proceeding under section 2698, Revised Statutes, had been made up.

The court overruled the motion, for the reason as given by the court, that the appraisement was not conclusive upon the defendant, and that he was entitled to show the same facts in the proceeding under section 2698, Revised Statutes. The defendant took a bill of exceptions and appealed. We see no error here whatever. Assuming here that the appraisement is erroneous, it does not appear that the sheriff is proceeding under it; and why a levy should be quashed, and the plaintiff lose the advantages which it gives him because the appraisers appointed under the homestead law may have acted erroneously, does not appear. The sheriff has suspended proceedings under the

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levy and appraisement, awaiting the action of the court in the proceeding under section 2698, Revised Statutes. This proceeding substantially takes the whole matter out of the hands of the sheriff and places it in the hands of the court, and the court has full power, under the statute, to deal with it in such a manner as shall preserve the rights of the respective parties, and be equitable and needful. It is clear that no error has been committed to the prejudice of the appellant, and the order of the court refusing to quash the levy and appraisement will be affirmed. All the judges concur.

JOSEPH O'MEARA, Respondent, *v.* JAMES GREEN, Appellant.

June 24, 1884.

1. SPECIAL TAXES — STREETS — REPAIRS — CONSTRUCTION.—Abutting property owners who constructed streets before the extension of the limits of the city of St. Louis are not liable for the repairs of such streets after the city limits are extended to include them, on the theory that such repairs constitute a construction of the streets.
2. —— Special tax bills issued for such work and which designate the work as construction work, are not conclusive as to the character of the work for which they were issued.
3. —— In a suit on a special tax bill, the question as to whether the work done was that usually done by the city under the head of repairs, or was wholly or in part an original construction of the street, is for the jury.
4. —— Under the charter of the city of St. Louis, the cost of the construction of streets is chargeable against abutting property holders, and the cost of repairing the streets must be paid by the city.

APPEAL from the St. Louis Circuit Court, LUBKE, J.
Reversed and remanded.

DYER, LEE AND ELLIS, for the appellant.

EBER PEACOCK, for the respondent.

THOMPSON, J., delivered the opinion of the court.

This was an action on a special tax bill. The plaintiff had a judgment, and the defendent has appealed to this

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court. The work was done under an ordinance for improving Washington Avenue from the old city limits to Vandeventer Avenue. The old city limits lay two hundred feet west of Grand Avenue. Prior to the adoption of the scheme and charter the entire portion of Washington Avenue embraced in this improvement lay outside the limits of the city. The property owners, of whom this defendant was one, had, at their own expense, improved Washington Avenue for a distance of four hundred and fifty feet west of the then city limits, by constructing the street and sidewalks in all respects the same as other streets in the city of St. Louis as then and now constructed, and on the same grade as that portion of Washington Avenue is now constructed, with the exception that the brick sidewalk was not continuous in all places. After the city, by the adoption of the scheme and charter, acquired jurisdiction over this territory, it several times repaired this street at its own expense. In executing the ordinance under which the street improvement in question was now made, the assistant city engineer found it necessary to do little more than put down a top dressing of sand and gravel upon this four hundred and fifty feet and piece out the brick sidewalk where it was not continuous. The evidence was somewhat conflicting as to the character and amount of work done throughout this four hundred and fifty feet; but it was clear that nothing was done in front of the plaintiff's lot beyond the putting down of a little top dressing of sand and gravel and rolling it. The president of the board of public improvements, in making out tax bills for the work done on this four hundred and fifty feet, appears to have acted upon the principle of giving the property owners credit for what they had done in constructing the street at their own expense, and of charging them with the additional work, which it had been found, or thought necessary, to do in order to make that portion of the street of the same standard as the portion

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westward of it to Vandeventer Avenue, newly constructed under the ordinance. By the charter of the city the cost of constructing streets is chargeable against abutting property owners, and the cost of repairing them is chargeable against the city. The power of a municipal corporation must be exercised reasonably, and if four hundred and fifty feet of Washington Avenue had, prior to the time when the city had acquired jurisdiction over it, been already constructed by the property owners in substantially the same manner as the street had been constructed to the east of it, and as it was now proposed to construct it to the west of it, a reasonable exercise of those powers would have required that this constructed section of the street be accepted from the property owners, and that the cost of repairing it be charged against the city, and not against them. If, however, what the property holders had done was no more than a partial or incomplete construction, the city had power to complete the construction of the same at their expense, so as to make that portion of the street uniform with the other portions of it.

Ministerial officers of municipal corporations in executing corporate ordinances, are equally bound to act reasonably. If the city's officer in this case had torn up all that had been done on this section of Washington Avenue and thrown the material away and reconstructed the street with the materials required by the ordinance, which were substantially the same materials as those which had been put down by the property owners, he would have acted within the letter of the ordinance; but he would have acted unreasonably and oppressively, and it can not be doubted that the courts would not have sanctioned this oppressive action by allowing the entire charge of making a new street to be imposed upon the property owners. In giving credit to the property owners for what they had done in constructing the street the action of the city's officer in this case was reasonable and commendable, but whether

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it was competent for him to make out special tax bills against the adjoining property owners for the additional work which had been done must depend upon a decision of the question whether this additional work was *construction* or *repairs.* If it was construction, it was chargeable against the adjacent property, if it was repairs, it was chargeable against the city. The conclusion of the city's officer upon this question, though *prima facie* correct, was not final. It was a question of fact to be tried and determined by the trier of the facts in this action. The court, sitting as a jury, did not try this question of fact, but gave a declaration of law to the effect that the ordinance under which the work was done was conclusive upon the question whether the work which was done was construction or repairs. We know of no principle which will uphold this ruling. It has often been held that the necessity of making a given improvement, within the limits of the charter powers of the city, is a question upon which the judgment of the legislative department of the city is conclusive. *Sheehan* v. *Martin*, 10 Mo. App. 285; *Kemper* v. *King*, 11 Mo. App. 116, 127; *Young* v. *St. Louis*, 47 Mo. 492. But this principle does not extend so far as to allow the legislature of the city to violate the charter itself, by charging the cost of street repairs upon adjacent property owners. The municipal assembly can not, merely by calling the repairs of a street by the name of construction or improvement, make such repairs construction or improvement, and so exonerate the city from paying for them, and cast the burden upon adjoining property owners. Whether the ordinance under which the work now in question was done, attempted to do this, was a question for judicial determination. In so far as it attempted to do it, it was void.

The circuit court should have tried and determined this question upon the evidence adduced, directing its inquiry to the question whether the work done on this four hundred

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and fifty feet of Washington Avenue was merely such work as is usually done by the city on its streets under the head of repairs, and such work as was merely necessary to restore the street where it had been worn out, or whether it was in part an original or new construction of the street. The action is an action at law; the evidence is, upon some points, conflicting; and we, therefore, have no jurisdiction to try and determine this question of fact, but we must remand the cause for this purpose to the circuit court. The judgment of the circuit court is accordingly reversed, and the cause remanded. All the judges concur.

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W. H. Fox, Respondent *v.* Pullman Palace Car Company, Appellant.

June 24, 1884.

1. Contracts — Practice. — In an action to recover money held as security for the faithful performance of a special contract, the plaintiff must show full performance of the contract on his part or a waiver by the defendant.

2. —— Pleadings — Actions. — In an action for money had and received, where the defendant sets up a special contract for the faithful performance of which the money is held, and alleges breaches thereof, and the cause is tried upon issues made as to the latter allegation, that the action was brought for money had and received is not ground for the reversal of the judgment.

Appeal from the St. Louis Circuit Court, Barclay, J. *Affirmed.*

Henry Hitchcock, for the appellant: The plaintiff can not recover on a case other than that made by the pleadings. — *Dougherty* v. *Matthews*, 35 Mo. 528; *Faulkner* v. *Faulkner*, 73 Mo. 327; *Waldheier* v. *Railroad*, 71 Mo. 514.

David Murphy, for the respondent: The instrument set out in the defendant's answer was executed by both parties,

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and the court properly refused to dismiss for failure to file it. — *Bowling* v. *Hax*, 55 Mo. 446.

THOMPSON, J., delivered the opinion of the court.

The petition demands the sum of $100 with interest, for "money had and received of plaintiff for the use and behoof of plaintiff." The answer denies that the defendant ever received any money of plaintiff for the use and behoof of plaintiff, except in the manner and under the conditions set forth in its counter-claim therein stated. It further avers that an agreement in writing was executed by the plaintiff, and was also executed by the defendant, by its agent thereto authorized, which agreement is in the following terms: —

"Whereas, W. H. Fox, party of the first part, has made application to Pullman's Palace Car Company, party of the second part, to be appointed and employed as conductor upon their coaches: therefore to guarantee and protect said company from any loss, by reason of any neglect, carelessness, dishonesty, dereliction of duty of any kind on his part in the course of said employment, the party of the first part has deposited with said company the sum of one hundred dollars, to be subject to and disposed of pursuant to the conditions of this agreement; and upon such deposit, and his execution of this agreement, said company have agreed to appoint him a conductor upon their coaches, and to continue him in their employment during their pleasure and no longer, and to pay him for his services, as such conductor, the compensation which they shall agree upon.

"The said party of the first part promises and agrees, well, honestly and faithfully to perform the duties of a conductor for the said Pullman's Palace Car Company, so long as he shall be continued in that employment, and to obey and fully comply with all rules and regulations now existing, as well as those which may, from time to time, be prescribed by the company for the conductors on said coaches, and that he will well and truly pay to the said company the

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fare of each and every passenger who shall ride in any coach on which he shall for the time be conductor, except those only who may exhibit a legal and proper ticket or 'free pass,' signed by a proper officer of the company; and he further agrees, that if, by reason of any neglect, carelessness, dishonesty, misconduct, disobedience, unfaithfulness, incompetency, or dereliction in duty of any kind on his part, in his said employment or duty of conductor, or any default on his part to collect or return to the company the full amount of fares accruing and of right payable to them as aforesaid, or if the said company shall suffer any loss or damage, or shall not receive in full the fares of all passengers riding in the coach or coaches of which the party of the first part shall be conductor, then the said company shall be authorized to retain so much of the sum of one hundred dollars so deposited with them, to and for their own use, and as their liquidated damages, as may be necessary to make good any such loss or damage as aforesaid.

"And the party of the first part hereby expressly agrees that each and every such item of loss or damage, in whatsoever way the same may arise, including such as may arise by reason of the non-payment by him of fares, as above agreed, to the said company, shall be decided and adjusted by the president or superintendent of said company.

"And the said company agree, that in the case of the discharge by them, at any time, of the said party of the first part, from his said employment as conductor, or upon his resignation of such employment (without right of retention of the same, as aforesaid, on their part, under this agreement), they will repay to him, on his written application therefor to the president of the company, and on giving his receipt therefor, the said sum of one hundred dollars, with interest at the rate of seven per cent per annum from date of deposit.

"In witness whereof, said party of the first part hath hereunto subscribed his name, and the said Pullman's Pal-

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ace Car Company have caused these presents to be subscribed by their president, this twenty-sixth day of August, one thousand eight hundred and eighty-one.

"Signed and delivered in the presence of

(Signed)	"W. H. Fox,	[SEAL.]
(Signed)	"PULLMAN PALACE CAR CO.,	[SEAL.]
	"By L. M. JOHNSON.	

"100 Rec'd. W. A. L."

The answer further avers that plaintiff has failed to perform the contract on his part, in that two certain sums of $14.50 and $7.00, respectively, received by plaintiff from passengers on the car of which plaintiff was conductor, were not paid over or accounted for to the defendant, as was required by the terms of the said agreement. Defendant prays judgment on its counter-claim for the sum of $21.50.

The plaintiff's reply makes no general denial of the new matters set up in the answer, but denies specifically that he collected the fares, as charged, and appropriated the same to his own use. To this is added a general denial of any right in the defendant to recover on its counter-claim.

It thus appears, that on the face of the pleadings, it is admitted that the contract was duly executed by both parties, and that the only money ever received by the defendant for the use of the plaintiff was that which he deposited with the defendant under the terms of the contract.

Upon the case as thus presented, the first question is, whether the plaintiff can recover anything under his petition. A general rule of pleading is that the party who seeks to enforce a right arising upon a contract must set up in his pleadings the contract and aver performance of the same on his part. I have not the slightest doubt that our code of procedure, properly interpreted, exacts a rigid adherence to this rule; for a fundamental idea of the reformed codes of procedure is that the pleader must apprise the opposite party in distinct terms of his ground of action or defence. A petition which merely alleges that the defend-

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ant is indebted to the plaintiff in a given sum of "money had and received of plaintiff for the use and behoof of plaintiff," does not do this, but conceals and covers up the real cause of action, if any there be. In a recent case we held that such a statement in an action commenced before a justice of the peace, which did not show from whom, when, where or how the money was had and received, was not good.

The judges who were called upon to interpret our code of procedure while yet it was new to the profession, seemed unable to appreciate fully the spirit in which it was framed, and subjected it, in some respects, to an unfriendly interpretation, which resulted in preserving some of the abuses of the former system which the code was intended to eradicate. One of these abuses was the rule which allowed a plaintiff having a right of action arising upon a contract for the recovery of a definite sum of money, to ignore the contract which gave him the right of action and merely to set up in his declaration that the defendant was indebted to him in a given sum of "money had and received by the defendant to the plaintiff's use." But in order to make good the claim thus stated in his declaration, it was necessary for him to prove the making of the contract out of which his right of action arose, and to prove that it had been wholly performed on his part, and that nothing remained to be done in order to its complete execution beyond the payment of the sum of money demanded by him of the defendant. This rule was propagated by our supreme court, as applicable to our reformed system of pleading, in *Stout* v. *St. Louis Tribune Co.* (52 Mo. 342, 347), where it was expressed by Vories, J., in the following language: "It is very true, that where work is done or services performed under a special contract, and the plaintiff has fully performed the contract on his part and nothing remains but a duty on the part of the defendant to pay the price agreed on, the plaintiff is not in

such case bound to sue on the written contract, but may use the common counts in *assumpsit*, but still when the contract is produced on the trial, the plaintiff will be required to prove that he has performed the contract on his part, and that by virtue of the provisions of the contract, the defendant is required to pay the price agreed on; if any fact necessary to create a liability on the part of the defendant to pay is wanting the plaintiff can not recover." In the case of *Mansur* v. *Botts* (80 Mo. 651), Mr. Commissioner Phillips, in giving an opinion adopted as the opinion of the supreme court, quoted the rule as thus laid down by Mr. Justice McLean in *Chesapeake, etc., Co.* v. *Knapp* (9 Pet. 541, 565): "There can be do doubt that where the special contract remains open, the plaintiff's remedy is on the contract, and he must set it forth specially in his declaration. But if the contract has been put an end to, the action for money had and received lies to recover any payment that has been made under it. * * * But if the contract remains open, the plaintiff's demand for damages arises out of it, and then he must state the special contract and the breach of it." Other cases were referred to in support of the same rule of pleading (*Dermott* v. *Jones*, 2 Wall. 9; *Fellows* v. *Dickinson*, 10 Mass. 292; *Knight* v. *New England, etc., Co.*, 2 Cush. 71); and it was held that there is nothing in the provisions of our code of practice which renders the rule inapplicable in this state, the court citing in evidence of this the ruling in *Stout* v. *St. Louis Tribune Co.* (*supra*). The rule was reaffirmed in the later case of *Plummer* v. *Frost* (not yet reported); and this rule of pleading must therefore be regarded as settled in this state.

But it is a part of this rule, as declared in all the cases decided by our supreme court, above cited, that a contract when disclosed at the trial will control and limit the amount and character of the recovery, if any, and the plaintiff will be required to prove that he has fully performed it on

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his part. "If any fact necessary to create a liability on the part of the defendant to pay is wanting, the plaintiff cannot recover." *Stout* v. *St. Louis Tribune Co.*, *supra*.

But so far as we know, except in the case of building contracts or other contracts to do work upon real estate, there is no rule of law in force in this state which allows a party who has a right of action arising out of a contract only, to ignore the contract, — treat it as a nullity, — and recover outside of the contract on what is termed a *quantum meruit*. The rule in regard to building contracts has been constantly denied in this state in the case of contracts for the mere rendition of personal services, as will be seen by the cases cited in the opinion just delivered in the case of *White* v. *Wright* (No. 2973, *post*); and the hardship of the rule in the case of building contracts has been sensibly felt, as will be seen by the observations of Hough, J., in *Haysler* v. *Owen* (61 Mo. 271, 275). We hold that it does not extend to the case before us.

It was therefore incumbent upon the plaintiff in order to make out his case, to prove that the contract had been wholly performed on his part, and that no fact necessary to create a liability on the part of the defendant to pay the sum claimed was wanting, or if any condition remained unperformed, that the defendant had *waived* performance of the same. Did he do this? The contract provided that in case of the discharge of the plaintiff from the employment of the defendant, the defendant would repay him the sum deposited with interest, "on his written application therefor to the president of the company, and on giving his receipt therefor." It does not appear that "any written application therefor" was ever made. Nor does it appear that "any application therefor" was ever made "to the president of the company." But it does not appear that a verbal application therefor was made by the plaintiff in person to the defendant's division superintendent at St.

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Louis, and through his attorney, to the defendant's cashier at St. Louis.

The parties having placed this condition in their contract, we should not be at liberty to dispense with its performance upon any supposed view of its immateriality. But it was clearly competent for the defendant to do this; and we think it clearly appears that the defendant has waived and dispensed with the performance of this condition on the plaintiff's part. The evidence shows that the defendant's division superintendent at St. Louis was vested by the defendant with full authority to settle and adjust this claim with the plaintiff; that this officer, both by himself and through his cashier, offered to pay to the plaintiff the deposit of $100 here sued for, less the sum of $21.50, which the defendant claimed the right to keep back, under the terms of the contract, as a "shortage," that is to say, as money which the defendant claims upon evidence furnished by its detectives, that the plaintiff had collected from passengers in the defendant's cars as the defendant's conductor, and had not accounted for. It appears that the defendant's cashier at St. Louis had instructions to pay the plaintiff the amount of his deposit, less this alleged shortage, and requested the plaintiff to take the same and close the matter up, which the plaintiff refused to do. After the plaintiff had thus made an oral demand upon the defendant for the amount which he now claims, and the defendant had, by announcing to him the terms on which it would settle, and by offering to pay him the amount which it held itself liable to pay, we think it would be unreasonable to allow the defendant now to say that the plaintiff shall not recover what, upon a full and fair contest, has been found to be due him, because he did not, before bringing the suit, go through the formality of demanding the sum claimed of the defendant's president in writing. The defendant, by its conduct, has clearly recognized the oral demand of the plaintiff as a sufficient

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compliance, and dispense with the contractd with the requirement of a demand in writing.

The contract, it will be perceived, makes the president or superintendent of the defendant company an umpire to adjust any claims which the company may have against the plaintiff on account of loss or damage which the company may sustain from the acts of the plaintiff while in its employ by reason of the non-payment of fares collected or otherwise. We do not feel called upon, in the state of this record, to say whether or not this clause of the contract is one which the courts would refuse to enforce: because it does not appear that the president or superintendent of the company has ever acted in virtue of the office of umpire, with which the contract invested him. It appears that the division superintendent at St. Louis has so acted; but the circuit court held, and we hold, that the contract refers to the general superintendent of the company, and not to its local or division superintendents. This is a point where the plaintiff has a right to stand on the contract as made, and it is not to be interpreted by the practice of one of the parties to it, unknown to the other party at the time it was made. The evidence shows that the defendant has one general superintendent beside its president, and also several local superintendents, called "division superintendents," at certain great cities, of whom Mr. Wickes is the one at St. Louis. If the company had no general superintendent there would be ground for the contention that a division superintendent was meant, since the language could have no other interpretation. But the word "superintendent," in this clause of the contract, appears in connection with the word "president," separated only by the conjunction "*or.*" The principle, *noscitur a sociis*, settles the meaning of the word superintendent to be the general superintendent. If any local or division superintendent had been meant, the contractor would have said so by using such an expression as

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"the president or *any* superintendent," or "the president" or "*a* superintendent." The umpire appointed by the contract of the parties has therefore not acted, and the plaintiff is not bound by the decision of another umpire selected by the defendant, namely, its division superintendent at St. Louis; but he is entitled to have his right determined by a court and jury; and that has been done, upon a full contestation, resulting in a verdict and judgment in his favor.

We see no ground, consistent with decisions of the supreme court, which are binding upon us, upon which we feel authorized to disturb this judgment. It is accordingly affirmed. All the judges concur.

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STATE OF MISSOURI EX REL. W. J. RUSSELL, Respondent, *v.* JOHN BEATTIE, Appellant.

June 24, 1884.

1. **MUNICIPAL CORPORATIONS — POLICE POWER — NUISANCE. — The charter of the city of St. Louis authorizes the regulation of livery stables, the designation of the places where, in future, they may be erected, and the prohibition of their erection at other places.**
2. **—— ORDINANCES. — An ordinance prohibiting the erection of a livery stable on any block of the city without the consent of the owners of one-half of the ground in any such block, is not an unreasonable exercise of the charter power. (THOMPSON, J., dissenting.)**

APPEAL from the St. Louis Circuit Court, THAYER, J.

Reversed and judgment.

HENRY HITCHCOCK, for the appellant.

JOHNSON, LODGE & JOHNSON and E. J. O'BRIEN, for the respondent.

THOMPSON, J., delivered the opinion of the court.

The case on behalf of the appellant has been ably presented, but we have not had the benefit of any argument or brief on behalf of the respondent. We have,

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nevertheless to decide as best we can, a question involving very considerable public interest.

The defendant was, at the time when this suit was prosecuted in the circuit court, the commissioner of public buildings of the city of St. Louis. In virtue of his office it was, under an ordinance of the city, his duty to grant permits for the erection of private buildings within the city. The plaintiff made an application to the defendant for a permit to erect a building in a certain block in the city, to be used as a livery stable. The defendant refused to issue such permit, and justified his refusal under the following ordinance:—

"An ordinance regulating the location of livery, boarding and sale stables.

"Be it ordained by the Municipal Assembly of the city of St. Louis, as follows:

"Section 1. Hereafter no livery, boarding, or sales stables shall be located on any block of ground in St. Louis without the written consent of the owners of one-half the ground of said block.

"Sect. 2. No permit shall hereafter be granted by the commissioner of public buildings for the erection of any livery, boarding, or sales stables until the foregoing provision is complied with, and the written consent aforesaid is filed in said office.

"Sect. 3. Any person maintaining a livery, boarding, or sales stable contrary to section one of this ordinance shall be guilty of a misdemeanor, and shall be fined not less than ten dollars nor more than two hundred dollars for each offence, and each day said stable is maintained as aforesaid shall constitute a separate offence.

"Sect. 4. There being no ordinance upon the subject-matter of this ordinance, it is deemed that an emergency exists, and hence this ordinance shall take full effect from and after its passage.

"Approved Nov. 22, 1882."

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The plaintiff thereupon instituted the present proceeding in the circuit court for a *mandamus* to compel the defendant to issue such permit. At the hearing in the circuit court a peremptory *mandamus* was awarded, and the defendant has appealed.

The only question which arises upon this record is whether this ordinance is a valid exercise of the powers conferred upon the city of St. Louis by its charter.

The validity of the ordinance is asserted by the defendant under three separate grants of power in the charter: 1. The power to regulate livery and sales stables. 2. The power to declare and prevent nuisances on public or private property, *and the causes thereof*. 3. The power conferred by what is known as the "general welfare clause" of the charter. Charter of St. Louis, art. III, sect. 26, sub-sects. 5, 6, and 14.

I. The first of these powers is conferred by section 26 of the charter in the following language: "The mayor and assembly shall have power within the city, by ordinance not inconsistent with the constitution or any law of this state, or of this charter. * * Fifth. To license, tax and regulate lawyers, doctors and doctresses, undertakers, dentists, auctioneers, grocers, merchants, retailers, hotels, boarding-houses, tenement-houses, office buildings, public buildings, public halls, public grounds, concerts, photographists, artists, agents, porters, runners, drummers, public lecturers, public meetings and shows, real estate agents and brokers, financial agents and brokers, horse and cattle dealers, patent right dealers, inspectors and gaugers, stock yard proprietors, examiners of titles, conveyancers, mercantile agents, insurance companies, and insurance agents, bankers, banking or other corporations or institutions, telegraph companies or corporations, street railroad cars, *livery and sale stables* hackney carriages, private carriages, barouches, buggies, wagons, omnibuses, carts, drays, and other vehicles, and all other business,

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trades, avocations, or professions whatever." 2 Rev. Stats. 1585, 1586.

This grant of power seems to be large enough to confer upon the mayor and municipal assembly the right to determine the *place where* livery and sales stables shall be located, as well as the *manner in which* the business of keeping them shall be carried on. A rule of interpretation which would restrict the meaning of the word regulate to the latter sense, would seem to be much too narrow. It has been recently held by the court of appeals of New York that an ordinance giving the power "to regulate the erection, establishment and continuance of slaughter-houses," confers upon the legislative authorities of the city the right to prescribe the *places* where the business of slaughtering animals shall alone be carried on. An ordinance restricting the erection of slaughter-houses to a certain portion of the city was held to be not only within this grant of power, but not void as being in restraint of trade; nor would it be presumed that the legislative authority of the city would exert this power in such a manner as absolutely to prohibit the slaughtering of animals within the city. Should this be done, the court reasoned that it would be time to consider the validity of such an ordinance when the question should arise. *Cronin* v. *The People*, 82 N. Y. 318. So, an ordinance providing that meat should not be sold except in a particular place within the village limits, was held good, the same not being in restraint of the right of sale, but merely a regulation thereof. *Village of Buffalo* v. *Webster*, 10 Wend. 99, 101. So, under a power to "regulate hacks," etc., it has been held that an ordinance which requires hacks when at railway depots to stand in a place to be designated by the police officer there on duty, is a valid and reasonable exercise of power, the court saying: "That they are regulations of hacks is apparent; and in our opinion they are not unreasonable and oppressive." *St. Paul* v. *Smith*, 27 Minn. 364.

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But the decisions of our own supreme court seem to furnish controlling authority upon this question. The vending to the inhabitants of the city of meat, poultry, and vegetables is even more necessary to the subsistence, health, and welfare of such inhabitants than the hiring of horses and vehicles to them for use on errands of business or pleasure; it is certainly a right of as high a character as the latter, and its unrestrained exercise may not be more prejudicial to the public health or comfort. But it was held by our supreme court as early as 1857, that a clause in the charter of the city of St. Louis, giving the mayor and city council the power "to regulate the inspection of butter, lard, and other provisions; to regulate the vending of meat, poultry, and vegetables; to restrain and punish the forestalling of poultry, butter, eggs, and fruit, and to suppress hucksters," confers upon them power to provide by ordinance that "no person, not being the lessee of a butcher stall, shall sell or offer for sale in market, or in *any other place*, any fresh meat in less quantities than one quarter." *City of St. Louis* v. *Jackson*, 25 Mo. 37. Such an ordinance, it has been held, is not in restraint of trade, but is both politic and proper. In giving the opinion of the court, Ryland, J., said: "This ordinance is not against any known law of our state, nor does it interfere with the right of selling the commodities of our citizens; it requires that the person retailing fresh meat shall have a stall in some market for that purpose. The city undergoes heavy expense in erecting commodious and convenient market-houses; it rents the stalls of those houses to butchers and others retailing fresh meats; the rents are of importance by way of income to the city. Now, to permit any one who may think proper to put up a block or shanty on any street or alley for the purpose of selling fresh meats in quantity less than a quarter, and thereby withdraw the purchasers from the market-houses, is at once giving to such retailers a very great

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advantage over those who rent the stalls and pay a high price for them." *Ibid.* 41.

This decision was reaffirmed in *City of St. Louis* v. *Weber* (44 Mo. 547), under a charter provision somewhat different in phraseology but similar in substance, and the authority of contrary decisions in other states. *St. Paul* v. *Laidlow* (2 Minn. 190), and *Bethune* v. *Hughes* (28 Ga. 560), was distinctly denied. Judge Bliss, in closing his opinion, said: "The power thus to regulate is not only sustained by *Jackson* v. *The City of St. Louis*, but by many authorities in other states. *Ash* v. *The People*, 11 Mich. 347; *Davenport* v. *Kelley*, 7 Iowa, 102; *Bush* v. *Seabury*, 8 Johns. 418; *Buffalo* v. *Webster*, 10 Wend. 99."

The power to regulate in cities the carrying on of trades which are necessary to the welfare of the inhabitants of such cities, and which must hence be carried on somewhere within the limits of such cities, but which trades, unless carried on in particular places, or in one place, where the manner of carrying them on can be made the subject of a practical system of public inspection, by prescribing the place or places in which alone such trades should be carried on, does not infringe any right guaranteed by the constitution and laws of this state, or by the constitution of the United States. The power thus to regulate is a part of that necessarily extensive and undefined power which resides in every government, called the police power. "Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, building with combustible materials, and the burying of the dead, may well," says Chancellor Kent, "be interdicted by law in the midst of dense masses of population, on the general and rational principle that every person ought so to use his property as not to injure his neighbor; and that private interests must be made subservient to the general interests of the community." "This,"

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said Mr. Justice Miller, referring to this language of Chancellor Kent, "is called the police power, and it is declared by Chief Justice Shaw (*The Commonwealth* v. *Alger*, 7 Cush. 84), that it is much easier to perceive and realize the existence and source of it than to mark its boundaries or to prescribe limits to its exercise. This power is and must be, from its very nature, incapable of any exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property." *Slaughter-house Cases*, 16 Wall. 36, 62. "It extends to the protection of the lives, limbs, comfort, and quiet of all persons, and the protection of all property, within the city; * * * persons and property are subject to all kinds of restraint and operations in order to secure the general comfort, health and prosperity of the state. Of the perfect right of the legislature to do this, no question ever was, or, upon acknowledged general principles, ever can be, made, so far as natural persons are concerned." *Thorpe* v. *Rutland & Burlington Ry. Co.*, 27 Vt. 146. Quoting this language, it was further said by Mr. Justice Miller, speaking for the court in the *Slaughter-house Cases:* "Regulations of the place and manner of conducting the slaughtering of animals and the business of butchering within the city, and the inspection of the animals to be killed for meat, and of the meats afterwards, are among the most necessary and frequent exercises of this power. It is not, therefore, needed that we should seek for a comprehensive definition, but rather look for the proper source of its exercise." 16 Wall. 63. In this very important case, a statute of Louisiana which created a corporation called an abattoir company, and which required all the slaughtering of animals within the city to be done on the premises of such corporation, was upheld as a valid exercise of the police power, and was

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held not to be within the inhibitions of the fourteenth amendment to the federal constitution.

We, therefore, do not doubt that it is competent for the mayor and municipal assembly, under the power given in the charter, to regulate livery stables, to prescribe not only the manner in which a livery stable shall be kept and cleansed, but also to confine the keeping of such stables to certain places in the city, if, in their judgment, the health, comfort, and welfare of the inhabitants require such a regulation.

II. The same section of the charter of the city of St. Louis prescribes that "the mayor and assembly shall have power within the city, by ordinance not inconsistent with the constitution or any law of this State or of this charter: * * * Sixth. To establish and enforce quarantine laws and regulations to prevent the introduction and spread of contagious diseases; to establish and regulate hospitals, and to secure the general health of the inhabitants by any measure necessary; to regulate stone quarries and quarrying of stone, and the slaughtering of animals; provide for the erection, management and regulation of slaughter-houses; prevent the driving of stock through the city; prohibit the erection of soap factories, stock-yards and slaughter-houses, pig-pens, cow-stables and dairies, coal oil and vitriol factories within prescribed limits, and to remove and regulate the same; and to regulate or prevent the carrying on of any business which may bè dangerous or detrimental to the public health, or the manufacture or vending of articles obnoxious to the health of the inhabitants; and *to declare, prevent, and abate nuisances on public or private property and the causes thereof;* and the mayor, whenever, in his opinion, a nuisance exists on public or private property, or whenever a nuisance has been so declared by ordinance or resolution of the board of health, is authorized to abate and remove such nuisance and the cause thereof in a sum-

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mary manner, at the cost of the owner or occupant of the premises where the nuisance or the cause thereof may be, and for that purpose may enter upon and take possession of any premises or property where such nuisance may exist or be produced." 2 Rev. Stats. 1586.

The power to pass the ordinance in question is claimed to exist under that clause of the above grant of power which confers upon the mayor and municipal assembly the power "to declare, prevent, and abate nuisances on public or private property, and the causes thereof." In considering this grant of power in the application here contended for, it has been thought best not to consider it as an isolated clause, but in connection with the other powers granted in the same sub-division, which seem to have for their object the preservation of the public health and safety. The effort of the draftsman of this clause seems to have been to frame the sub-division so as to confer upon the mayor and municipal assembly the largest possible powers to accomplish the intended ends, which were deemed consistent with the constitution and laws of the state. So far as this sub-division undertakes to *define*, it is to be observed that it says nothing of livery stables. It confers the power to *prohibit* the erection of certain analogous establishments, among them stock-yards, pig-pens, cow stables and dairies; and power to *remove* and regulate the same. It also confers power to *regulate* and *prevent*, the carrying on of *any business* which may be dangerous and detrimental to the public health. Beyond these grants of power, the power conferred in regard to nuisances generally seems as extensive and summary as could well be. The mayor and municipal assembly have power to declare by acts of legislation what shall be nuisances; and beyond this, the mayor has power, whenever *in his opinion* a nuisance exists on public or private property, or whenever a nuisance has been so declared by ordinance or resolution of the board of health, to abate and remove the same in a summary way, and at the cost of

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the occupant of the premises. These are very sweeping and extensive grants of power. Whether they can be upheld as being "not inconsistent with the constitution or any law of this state," we need not now consider. Legislative power on the part of municipal corporations to declare nuisances has been restricted by judicial interpretation to the power to declare those things to be nuisances which are nuisances *per se;* that is which are necessarily and unavoidably nuisances, and which are accordingly said to be nuisances as matter of law. But where an establishment, trade, or occupation is lawful, and not in itself a nuisance, but nevertheless may become such from the place where or manner in which it is erected or carried on, it seems to be settled by the general current of authority that it is not competent for the legislative power, much less for the executive power of a municipal corporation, to make it a nuisance by merely declaring it to be such; but whether or not it shall be abated as a nuisance is a judicial question, to be decided in an action at law by the verdict of a jury; or, under special circumstances, in a proceeding in equity by the decision of a judge; the principle in both cases being that the party whose establishment or trade is sought to be abated as a nuisance is to be heard before he is condemned, and that evidence must be produced against him, and that he must have an opportunity of rebutting the same before his natural right to use his property in such manner as he may deem conducive to his own welfare shall be restrained in order to subserve the rights of others. This general doctrine, that the power to declare nuisances on the part of municipal corporations exists within those limits, is laid down by Judge Dillon in his work on Municipal Corporations, at considerable length. 1 Dill. Mun. Corp. (3d ed.), sects. 374–379.

It seems to be quite clear that the mayor and municipal assembly would not, under such a grant of power, have the authority by ordinance to declare an existing livery stable a

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nuisance. Such a declaration, it seems, would be a deprivation of property without due process of law, and an invasion by the legislature of the powers of the judicial department of the government. If it could not declare an existing establishment, known perhaps to be highly offensive to the immediate inhabitants, to be a nuisance, such establishment not being a nuisance *per se* — for instance, a livery stable or a blacksmith's shop — I do not see how it can be held to possess the power of declaring in advance that such an establishment shall be prohibited because it may become a nuisance. To do this, it seems to me, would not only be an exercise by the legislative department of the city of a judicial power, but it would be going farther in the exercise of such a power than the judicial courts have ever gone; for it is a settled doctrine of the courts that judicial powers will not be exerted to enjoin an eventual or contingent nuisance. *Earl of Ripon v. Hobort*, 3 Milne & K. 169 ; *s. c.* Coop. Cas. Temp. Brougham, 333 ; *Mayor of Rochester v. Curtiss*, Clarke Ch. Cas. (N. Y.) 336 ; *Eastman v. Amoskeag Man. Co.*, 47 N. H. 71 ; *Laughlin v. President*, 6 Ind. 223, 227 ; *Dana v. Valentine*, 5 Metc. (Mass.) 8, 12 ; *Cleveland v. Gas Co.*, 20 N. J. Eq. 201 ; *Goodall v. Crafton*, 33 Ohio St. 271 ; *Rhodes v. Dunbar*, 57 Pa. St. 274; *Dorsey v. Allan*, 85 N. C. 358 ; *Ross v. Butler*, 19 N. J. Eq. 294 ; *Green v. Lake*, 54 Miss. 540, 546 ; *Duncan v. Hays*, 22 N. J. L. 25. It was upon this ground that Judge Dillon, in 1879, refused to enjoin this same plaintiff from erecting a livery stable in a block of the city of St. Louis devoted to residences. *Flint v. Russell*, 5 Dill. 151.

The power conferred by the sub-section of the charter last quoted "to declare, prevent, and abate nuisances on public or private property, *and the causes thereof*," is undoubtedly a very extensive power; and while I am not willing to concede that it extends so far as to authorize the mayor and municipal assembly to make by an ordinance

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that a nuisance which was not so before as a matter of law, yet I do not doubt that it does enable them to take precautions against eventual or contingent nuisances, by confining within certain limits certain establishments, trades, or occupations, which, from their known character, are likely to become such. I do not doubt that they can confine within certain limits and consequently prohibit within all other limits, the establishment of livery stables, white lead factories, tobacco factories, and other like establishments, which, though necessary and useful, and therefore not to be prohibited, are, nevertheless, according to general experience, offensive to those who dwell in their immediate vicinity, depriving such persons, to a material degree, of health or physical comfort, or both.

Nor do I suppose that, in order to the validity of an ordinance passed for this purpose, it is necessary that it should recite that it is passed for the purpose of regulating or restricting a certain thing because it is likely to cause a nuisance. In other words, I think it must be conceded, as the learned counsel for the defendant argues, that it is not necessary in order to the validity of a municipal ordinance, that it should recite the specific grant of power in the exercise of which the same is passed. *Young* v. *St. Louis*, 47 Mo. 494; *Kiley* v. *Forsee*, 57 Mo. 395.

III. The power to pass the ordinance in question is also claimed under what is known as the general welfare clause of the charter — the fourteenth and last clause of the section which contains the grant of legislative powers to the corporation. This, read in connection with the enacting clause, is as follows: "The mayor and assembly shall have power within the city, by ordinance not inconsistent with the constitution or any law of this state, or of this charter: * * * Fourteenth. Finally, to pass all such ordinances, not inconsistent with the provisions of this charter, or the laws of the state, as may be expedient, in maintaining the peace, good government, health, and welfare of the city, its

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trade, commerce, and manufactures, and to enforce the same by fines and penalties not exceeding five hundred dollars, and by forfeitures not exceeding one thousand dollars." 2 Rev. Stats. 1588.

This clause, I take it, was not intended to increase or enlarge any of the powers already specially enumerated. It was intended as a precautionary enactment, to the end that the enumeration of powers already recited should not be held to exclude other powers of an analogous character which might be found expedient, under changing circumstances, for the maintenance of the peace, good government, health, and welfare of the city, its trade, commerce, and manufactures. We are indebted to the learned and exhaustive brief of the appellant for the citation of some decisions which indicate the nature of the power thus conferred. In *St. Louis* v. *Cafferata* (24 Mo. 96), an ordinance prohibiting the keeping open of shops on Sunday was held valid under the general welfare clause of the charter of St. Louis of 1851, which was substantially the same as the corresponding clause of the present charter. In *The State* v. *Cowan* (29 Mo. 330), the above decision was referred to with approval, and an ordinance prohibiting furious riding through the streets of Bolivar was held valid, under a charter power enabling the trustees to pass such ordinances "for the regulation and police of said town as they shall deem necessary, not repugnant or contrary to the laws of the land." The power to pass ordinances prohibiting the erection of wooden buildings within the limits of towns or cities with the view of preventing conflagrations, is supposed by a learned writer to be embraced within a general grant of power to provide for the safety and welfare of the inhabitants. Dill. Mun. Corp. (3d ed.), sect. 405. If the grants of power previously considered were not sufficient for the purpose, I should not doubt that, under this grant of power, it would be competent for the municipal legislature to prescribe by an ordinance reasonable in itself, and not inconsistent with the

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constitution or general laws of the state respecting the rights of private property, the localities or proper limits within which alone certain offensive trades and occupations shall be carried on.

All the members of the court are of opinion that the mayor and municipal assembly of St. Louis have power, under the charter of the city, to regulate livery, boarding, and sale stables within the limits of the city, with the view of promoting the comfort of the inhabitants of the city, by prescribing the place where such establishments may in future be erected, and by prohibiting their erection in all other places. Two questions, however, touching the validity of this ordinance remain to be considered, upon which the members of the court are not agreed. The first is whether the ordinance is a reasonable exercise of the power of the city as above stated; the second is whether it is not a delegation of legislative power. Judges Lewis and Bakewell are both of opinion that the ordinance is a reasonable exercise of the power of the city in the premises, and that it is not void as being an attempted delegation of legislative power. As I can not speak for the other members of the court upon questions in respect of which I do not agree with them, I shall limit myself to announcing the conclusion of the majority of the court, at the same time taking occasion to state the reasons which influence me in disagreeing with the majority upon these two remaining questions.

IV. The first of these questions is whether the ordinance is a reasonable exercise of the power conferred upon the city by its charter, as above defined. It is to be observed that, in order to the validity of a municipal ordinance, under the charter of St. Louis, three things are necessary: 1. The power to pass it must either be expressly or by necessary implication granted in the charter. 2. The charter provision granting it must itself be valid — that is, it must be in harmony with the constitution and laws of the state. 3. In addition to these, the ordinance must be a reasonable

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exercise of the power granted. It follows that something more is necessary, in order to the validity of a municipal ordinance, than that it should have been passed in pursuance of a power conferred by the charter. The charter provision itself may be invalid; the ordinance may be invalid because an unreasonable exercise of the power conferred by the charter.

By the constitution of this state, the charter of the city of St. Louis is required to be "in harmony with and subject to the constitution and laws of Missouri." Const. Mo., art. 9, sect. 20. The constitution of this state, in the bill of rights, provides that all persons have a natural right to life, liberty, and the enjoyment of the gains of their own industry." Const. Mo., art. 12, sect. 4. This, of course, does not confer upon any one the absolute right to use his property as he pleases. No such right exists in a state of civil society; but, on the contrary, the right of one to use his own must always be exercised in subordination to the rights of others, in conformity with the maxim *sic utere tuo ut alienum non lædas*. *The State* v. *Addington*, 12 Mo. App. 214, 217; *s. c.* affirmed 77 Mo. 110. The same instrument provides that "no person shall be deprived of life, liberty, or property, without due process of law." *Ibid.*, sect. 30. Clearly, this provision was not intended to withdraw the rights of private property from the reasonable exercise of the police power by the legislative branch of the government. *The State* v. *Addington*, *supra*. "All rights are held subject to the police power of the state." *Beer Co.* v. *Massachusetts*, 97 U. S. 25, 32. Nor does that clause of the constitution of the United States which provides, "nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," restrain the legislative power of a state from a reasonable exercise of the police power. *Slaughter-house Cases*, 16 Wall. —; *Barte-*

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meyer v. *Iowa*, 18 Wall. 129; *Beer Co.* v. *Massachusetts*, *supra*.

Although this is, perhaps, the most extensive power of government, for it appeals for its very existence to the maxim *salus populi suprema lex* (*Beer Co.* v. *Massachusetts*, *supra*), yet the decisions generally agree that it is not an unrestrained power. It "can not be exercised capriciously, so as to strike down the right of liberty or property, where no real or apparent benefit will be promoted thereby." *The State* v. *Addington*, *supra*. And when it is clearly so exercised, the judicial courts, upholding the rights secured by the constitutional guarantees above quoted, will declare the statute void, and refuse to enforce it.

For still stronger reasons, the judicial courts will declare a municipal ordinance invalid when it transcends a reasonable and proper exercise of the police or other powers conferred by the municipal charter. It is not necessary to refer to decisions to show that the by-laws or ordinances of municipal corporations may be declared invalid by the judicial courts, when they are clearly unreasonable. There is no question of the existence of the power. But it can not escape attention that this power is in the nature of a judicial veto upon the acts of municipal legislatures, which under our system of municipal government, are elected by the people; whose members, drawn from all classes of the community, perform their legislative functions under the immediate eye of their constituents; and who are, hence, presumptively better able to judge of what is a reasonable exercise of their powers than the judicial courts are. This being so, "a clear case should be made out to authorize an inference upon the ground of unreasonableness." *City of St. Louis* v. *Weber*, 44 Mo. 547, 550, per Bliss, J. "That a large and liberal discretion is to be allowed to the municipal authorities is conceded." *City of Cape Girardeau* v. *Riley*, 72 Mo. 220, 224, per Napton, J. The

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grounds on which such ordinances may be declared invalid on the head of unreasonableness, have been indicated by our supreme court in three cases: In the first, it was said that an ordinance may be so declared if it "is oppressive, unequal, and unjust." *City of St. Louis* v. *Weber*, *supra*. In the second case it was said that it might be so declared if it was "altogether unreasonable and oppressive," and evidence was admissible to prove a state of facts leading to this conclusion. *Corrigan* v. *Gage*, 68 Mo. 541, 545, per Sherwood, J. It was so held of an ordinance providing for the collection of delinquent city taxes, which imposed a penalty of $25 for the city attorney's fee in case suit should be brought and judgment recovered for the taxes by the city, and an additional fee of $50 for the city attorney's fee in case of an appeal to the supreme court. The imposition of these penalties, in addition to two per cent a month as interest, was held unreasonable. *City of Cape Girardeau* v. *Riley*, 72 Mo. 220.

With these expressions of our supreme court for our guide, I think it clear that, assuming that this ordinance is otherwise within the scope of the powers conferred upon the legislature of the city, we ought to declare it unreasonable. It is to be observed that it does not purport or attempt to prescribe any place or places within the limits of the city within which alone livery stables may in future be erected or carried on; but that it remands the decision, in every case, to the vote of the owners of one-half the ground in the particular block in which the livery stable is sought to be established. It is easy to see that this may amount to an entire prohibition within the limits of the city of the erection of any livery stables not already in existence, according to the opinion or caprice of property owners in particular localities. It is well settled that a livery stable is not a nuisance *per se*. *Aldrich v. Howard*, 7 R. I. 87: *s. c.* 8 *Id.* 246; *Burditt v. Severson* 17 Texas, 489; *Dargan v. Waddill*, 9 Ired. Law, 224; *Kirkman*

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v. Handy, 11 Humph. 406; *Croker v. Birge*, 10 Ga. 336; *Harrison v. Brooks*, 20 *Id.* 537; *Morris v. Brower*, 1 Anth. 368; *Ball v. Ray*, L. R. 8 Ch. 467; *Broder v. Saillard*, 2 Ch. Div. 692. It is unnecessary to suggest that it is an employment which is highly necessary and conducive to the comfort and convenience of the inhabitants of a city. It is equally obvious that there are many localities in a large city like St. Louis, where the keeping of a livery stable in the ordinary mode could not be adjudged a nuisance. In the vicinity of a white lead factory, a soap factory, a bone factory, or a tannery, a livery stable would smell sweet. And yet, under the operation of this ordinance, a man might own one corner of a block embracing one-fourth of the ground in it. On the other corner there might be a white lead factory, on the other a soap factory, and on the other a tannery; and yet, without the consent of two of the other three proprietors of the block, each of them maintaining an establishment much more offensive to the public, the owner of the vacant lot could not use it for the purpose of a livery stable. It may be said that this illustration supposes an extreme case. I do not think so. I do not think that where the owners of one-half the ground in a block have a veto upon the erection of a livery stable in the block, human nature being what it is, they would hesitate to demand their price for the granting of the privilege. I do not think that it is competent for the legislature of a city thus to allow the owners of one-half the land in a block, wholly without reference to the uses to which they have put their own property, and wholly without reference to the location and surroundings, to prohibit any lot owner in the block from making a lawful use of his property, when such use of it might not be a nuisance at all in that locality. If this ordinance is upheld as valid, then every livery stable keeper in the city, when, by reason of an increase of public patronage, his present

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location becomes inadequate for his business, will be sent as a mendicant from block to block, hat in hand, soliciting the privilege of establishing and carrying on his lawful calling.

V. I also think that this ordinance is invalid as an attempt on the part of the legislature of the city to delegate to the owners of one-half the ground in each block of the city the power which the charter has committed to such legislature, of determining whether a certain trade which is likely to become a nuisance shall be restrained in that locality. It seems to me to be an attempt to delegate a legislative power, and to be for this reason void. *Ruggles v. Collier*, 43 Mo. 353; *City of St. Louis v. Clemens*, *Id.* 395; *City of St. Louis v. Clemens*, 52 Mo. 133; *Thompson v. Boonville*, 61 Mo. 282; *Mathews v. City of Alexandria*, 68 Mo. 119. It is more; it is an attempt to confer upon the inhabitants of such block a judicial power more extensive than the judical courts have ever exercised — the power to enjoin an eventual or contingent nuisance. That courts of equity will never exercise this power has already been shown by a numerous citation of cases, including one in which the exercise of this power was sought against this very plaintiff, and denied by an eminent judge. *Flint v. Russell*, 5 Dill. 151.

But a majority of the court being, as already stated, of opinion that the passage of this ordinance was within the power of the mayor and municipal assembly of the city of St. Louis, it merely remains for me to announce the judgment of the court; which is that the judgment of the circuit court be reversed, and the judgment be entered in the court here for the defendant. Judges LEWIS and BAKEWELL concur in this conclusion; I dissent from it, for the reasons above stated.

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GEORGE M. FORSTER, Appellant, *v.* MULLANPHY PLANING MILL COMPANY, Respondent.

June 24, 1884.

1.—CORPORATIONS — FRAUDULENT CONVEYANCES — DIRECTORS — TRUST RELATIONS.—The directors of a business corporation may, by their votes, authorize the execution of a deed which has the effect of giving them a preference as *bona fide* creditors over other creditors of the corporation.

2. —— A deed of its assets by a corporation to one of its directors to secure a loan made by him to it when the latter was in embarrassed circumstances, is not necessarily void.

3. —— ATTACHMENT.—A conveyance which will authorize an attachment on the ground that it is in fraud of creditors must be absolutely void as to creditors, so as to create a resulting trust in their favor and constitute the grantee a trustee for their benefit.

APPEAL from the St. Louis Circuit Court, BARCLAY, J. *Affirmed.*

CHAS. B. STARK and A. MOORE BERRY, for the appellant: The directors of a solvent corporation are trustees for the shareholders, and are subject to all the duties and disabilities of trustees.—*McAllen* v. *Woodcock*, 60 Mo. 174; *Lingle* v. *Hogan*, 45 Mo. 109; *Bent* v. *Priest*, 10 Mo. App. 543–547; *Skrainka* v. *Allen*, 7 Mo. App. 434; *Brewster* v. *Stratman*, 4 Mo. App. 41; *Cumberland Coal Co.* v. *Sherman*, 30 Barb. 553; *Koehler* v. *Black River Falls Iron Co.*, 67 U. S. (2 Black) 715. The directors of an insolvent corporation are trustees for the benefit of its creditors.— *Bradley* v. *Farwell*, 1 Holmes, 433; *Hopkins and Johnson's Appeal*, 90 Pa. St. 69; *Marr* v. *The Bank of West Tenn.*, 4 Cold. (Tenn.) 471; *Jackson* v. *Ludeling*, 88 U. S. (21 Wall.) 616; *Railroad Co.* v. *Howard*, 74 U. S. (7 Wall.) 392–409; *Lingle* v. *Hogan*, 45 Mo. 109, 110; *Skrainka* v. *Allen*, 7 Mo. App. 434–438–440; *Eyerman* v. *Krieckhaus*, 7 Mo. App. 455; *Chouteau* v. *Allen*, 70 Mo. 290–338. A trustee will not be permitted to create such a

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relation between himself and the trust property as will make his own interest antagonistic to that of his beneficiary. — *Lingle* v. *Hogan*, 45 Mo. 109; *McAllen* v. *Woodcock*, 60 Mo. 174; *Bent* v. *Priest*, 10 Mo. App. 543–557; *Skrainka* v. *Allen*, 7 Mo. App. 434; *Brewster* v. *Stratman*, 4 Mo. App. 41; *Koehler* v. *Black River Falls Iron Co.*, 67 U. S. (2 Black) 715; *Jackson* v. *Ludeling*, 88 U. S. (21 Wall.) 616; *Sawyer* v. *Hoag*, 84 U.S. (17 Wall.) 610. The term fraud, as understood in the statute concerning fraudulent conveyances, has the same meaning in the attachment law; and it is not necessary to show that the act originated in any premeditated design to commit a positive fraud or to injure other persons. — *Reed* v. *Pelletier*, 28 Mo. 173; *Beach* v. *Baldwin*, 14 Mo. 597. When one makes a conveyance of his property to hinder, delay or defraud his creditors, a trust results thereby in their favor, and the deed, as against them, is "utterly void," and such property may be seized on attachment or execution at law against him, and sold. — Rev. Stats. 1879, sect. 2497; *Ryland* v. *Callison*, 54 Mo. 513.

JAY L. TORREY, for the appellant: The assets of an insolvent corporation are a trust fund primarily for the benefit of its creditors and secondarily for its shareholders; and its directors and managers occupy a fiduciary relation toward both creditors and shareholders.—*Drury* v. *Cross*, 7 Wall. 302; *Jackson* v. *Ludeling*, 21 Wall. 616; *Brewster* v. *Stratman*, 4 Mo. App. 41; *Covington, etc., R. Co.* v. *Bowler*, 9 Bush, 468; *Lingle* v. *Nat. Ins. Co.*, 45 Mo. 109; *McAllen* v. *Woodcock*, 60 Mo. 174; *Wood* v. *Dummer*, 3 Mason, 308. The fiduciary relation which exists between the directors of an insolvent corporation and its creditors is of such a character as to render an attempt on the part of such directors to secure a preference for debts due to themselves out of the assets of such corporation, fraudulent in law. — *Bradley* v. *Farwell*, 1 Holmes, 433; *Curran* v. *The State of Ark.*, 15 How. 307; *Drury* v. *Cross*, 7

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Wall. 299; *Little Rock, etc., R. Co.* v. *Page*, 35 Ark. 304; *Hopkins' and Johnson's Appeal*, 90 Pa. St. 76; *Farmers' and Merchants' Bank* v. *Downey*, 53 Cal. 466; *McDowell* v. *Ark. Machine Co.*, 38 Ark. 17; *Stout* v. *Yaeger Milling Co.*, 13 Fed. Rep. 802; *Union National Bank* v. *Douglas*, 1 McCrary, 86.

LEONARD WILCOX and H. J. GROVER, for the respondent: A director in a corporation has a right to deal with such corporation in any way that any other person can. — *St. Louis* v. *Alexander*, 23 Mo. 527, 531; *Kitchen* v. *Railroad*, 69 Mo. 243, 245, 254 and 255; *Buell* v. *Buckingham*, 16 Iowa, 284; *Smith* v. *Skeary*, 47 Conn. 54; *Duncourt* v. *Railroad*, 84 N. Y. 199, 207; *Whitwell* v. *Warner*, 20 Vt. 444, 445; *Gordon* v. *Preston*, 1 Watts, 387; *Twin Lick Oil Co.* v. *Marburg*, 1 Otto, 587. A corporation which is insolvent merely — as well as a partnership or individual — can prefer one creditor to another. — *Catlin* v. *Bank*, 6 Conn. 233, 241; *Poudville & Co.* v. *Clark*, 25 Conn. 97; *Maryland* v. *Bank*, 6 Gill & J. 219, 220; *Poole's Case*, 9 Ch. L. Div. 322, 328; *St. Louis* v. *Alexander*, 23 Mo. 483; *Sheely* v. *Booth*, 73 Mo. 77; *Dougherty* v. *Cooper*, 77 Mo. 528. If, by reason of the insolvency merely of the defendants, its assets became a trust fund for creditors, it was a joint trust for all its creditors and can not be enforced by plaintiff in a suit at law. — *Edwards* v. *Welton*, 25 Mo. 379; *Craig* v. *Gregg*, 83 Pa. St. 19; *Grear* v. *Gouge*, 69 N. Y. 154; Thorn on Liability of Officers, etc., 257; *Fusz* v. *Spaunhorst*, 67 Mo. 264; *Smith* v. *Poor*, 40 Me. 422. The liability of a principal to indemnify and secure his surety or accommodation indorser is a debt contracted from the time the surety is given. — *Rice* v. *Southgate*, 16 Gray, 142; *Bayer* v. *Coal Co.*, 106 Mass. 131; *Duvall* v. *Raisin*, 7 Mo. 450.

BAKEWELL, J., delivered the opinion of the court.

This was an action upon promissory notes, begun by at-

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tachment, upon the ground that defendant had fraudulently conveyed, assigned, and disposed of its property and effects, so as to hinder and delay its creditors.

The issue raised by the plea in abatement was submitted, upon an agreed statement of facts, to the court without a jury. The court found the issue in favor of defendant, and the attachment was dissolved.

The facts, as agreed upon, are as follows: —

On the 5th of May, 1883, defendant executed and delivered to one Joseph P. Schureman, a deed, in the ordinary form of a deed of trust to secure the payment of money. This deed embraced the leasehold on which the planing mill of defendant is erected, and all the materials, appliances, machinery, etc., appertaining to the mill, and all open accounts and money due to the mill, and was given to secure the following indebtedness of defendant described in the deed: —

A note of defendant, due May 21, 1883, for $2,500, payable to the order of F. Germer, and indorsed by F. Germer, William Leroi and Meyer & Stipp; also a note of defendant for $500, due May 15, 1883, payable to A. Meyer; also a note of defendant, due May 30, 1883, for $674.70, payable to Meyer & Stipp; also sums in cash to the amount of about $2,000, due to twenty-eight different creditors of the company, whose names are set out in the deed with the sum due to each one. All of this indebtedness was a *bona fide* liability of defendant at the time the deed was executed, as set out in the deed. Of the accounts, one was to Germer for $236, one to Holkemper, for $46.00, and one to Stender for $33.00. These three men were directors of defendant when the deed was given. The $2,500 note had been indorsed for defendant's accommodation, and discounted at the Mullanphy Savings Bank by defendant, which received the proceeds and used them in its business. The note was held by the Mullanphy Bank when the deed was executed; and, at its maturity, on May 21, 1883, the ac-

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commodation indorsers named above, their liability having been fixed, paid the note, and ever since held it. The note for $674.70 was given for money lent to defendant by Meyer & Stipp. Meyer, Germer, Holkemper, and Stender were directors of defendant when the deed was executed.

The board of directors of defendant was fixed at thirteen persons. The deed was executed under a resolution of this board passed April 30, 1883. Ten directors voted for the resolution. Two were absent; one voted against it. The four directors named above as beneficiaries in the deed voted for the resolution. The majority vote determines the action of the board.

Defendant was insolvent when the deed was executed; but the deed was not fraudulent in fact; nor was it executed or received with any fraudulent purpose or intent on the part of any of the parties to it, to hinder or delay any creditor or creditors of defendant, but in good faith for the *bona fide* purpose of securing the claims therein mentioned.

Plaintiff's suit is upon four notes of defendant, each for $1,600, all dated September 14, 1881, maturing in one, two, three, four, and five years after date.

To warrant attachment on the ground of a fraudulent conveyance of the debtor's property, it is not essential that the conveyance should have been made with any dishonest intent. The intention may have been not to defraud creditors, but to better provide for their payment by preventing a sacrifice of the assets at forced sale; but, if the natural and necessary effect of the deed is to hinder and delay the creditors, the conveyance is a fraud in law of such a character as will warrant an attachment. *Reed* v. *Pelletier*, 28 Mo. 173. A conveyance thus fraudulent in law, is to be regarded as utterly void as to the attaching creditor. It is for this reason that he need not apply to equity for relief, but may at once proceed by attachment. *Ryland* v. *Callison*, 54 Mo. 513.

A conveyance, however, is not fraudulent merely be-

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cause creditors are preferred by it. Such a deed hinders and delays one or more creditors, and such is the necessary intent of it; but it can not be objected to on that ground alone. *The State to use* v. *Laurie*, 1 Mo. App. 371.

If the conveyance under consideration in the present case is void for constructive fraud, so as to furnish a ground for attachment, it must be on the ground that the fiduciary relations of the directors of defendant to the company and the creditors of the company rendered them incompetent to authorize by their votes a deed which had the effect of giving them, as *bona fide* creditors of the company, a preference over some other creditors of the same company.

It is not necessary that we should critically examine all the cases which the diligence of counsel for appellant has brought together in their carefully prepared brief as bearing upon the question of the trust relations of directors of corporations. Some of these cases are cited by counsel as authority for propositions which we can not accept as law. In view of what is said by the supreme court in *Kitchen* v. *St. L., K. C. & N. Ry. Co.* (69 Mo. 254), and of the approval there expressed of the doctrine of the case of *Twin-Lick Oil Company* v. *Marbury* (1 Otto, 588), and of the separate opinion of Judge Ryland in *The City* v. *Alexander* (23 Mo. 528), and the cases cited in that opinion by Judge Ryland, we must hold that the directors of a corporation are not prohibited from lending it moneys when they are needed for its benefit and the transaction is open and otherwise free from blame; nor are they prohibited from taking a deed of trust upon property of the company to secure such indebtedness, nor from purchasing such property under a fair public foreclosure sale under the deed of trust.

The case of *The City* v. *Alexander* is severely criticised by Judge Sherwood in *The State ex rel.* v. *Garoutte* (67 Mo. 445), commonly known as the Green County Bond Case. From that opinion Judge Hough and Judge Napton dissented at the time. But the criticism of Judge Sher-

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wood goes only to the *per curiam* opinion, and does not touch the separate opinion of Judge Ryland, or the question treated of in that opinion, and the case of *Kitchen* v. *Railroad Co.* (*supra*), is a later case in which none of the judges dissent.

In the last named case it was held that the fact that one or more of the persons proposing to advance money to complete a railroad were directors to whom the proposition was made, and by whom it was accepted, does not vitiate the contract, nor make it void; and the court adopts the language of Judge Miller in *Twin-Lick Company* v. *Marbury* (*supra*), that "a rule forbidding one director amongst many from loaning money to a corporation where the money is needed, and the transaction open and free from blame, while it would afford little protection to the corporation against actual fraud, would deprive it of the aid of those interested in giving aid, and best qualified to judge of the necessity of that aid, and the extent to which it might be given."

It would seem to follow from this that the director lending the money may take the ordinary fair business means for his protection when dealing thus with the corporation of which he is director. And our own supreme court, in the the case just cited, proceeds to approve the same doctrine as laid down in Judge Ryland's separate opinion in *The City* v. *Alexander* (*supra*).

It is said by Judge Dillon, in *Buell* v. *Buckingham* (16 Iowa, 284), that a director of a corporation may avail himself of his superior knowledge, and of the advantages of his position, in running a race with other creditors to obtain security for his debt; and by Judge Redfeld in *Whitewell* v. *Warner* (20 Vt. 444), that it is certainly not competent to predicate constructive fraud on the mere fact of a stockholder availing himself of his superior advantages to obtain security for debts due to himself to the exclusion of other debtors. The inequality between the stockholder

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and the stranger is one that the law allows, and which is understood by those dealing with the corporation.

That a corporation in failing circumstances may assign its property to preferred creditors, just as individuals may do in like circumstances, seems to be generally settled. And this is true whether the assignment be general or partial, if the whole fund is assigned in good faith and without fraud. *Ex parte Conway*, 4 Ark. 354; 13 Ark. 575; *Whitewell* v. *Warner*, *supra; Dana* v. *United States*, 5 W. & S. 223. That this doctrine is inconsistent with the settled principle that the assets of a corporation are a trust fund for the benefit of creditors must be admitted. We do not pretend to reconcile the cases in these points.

It is also clear that the lien of the creditors upon the assets of a corporation does not become fixed by the mere fact that the debts of a corporation exceed its available assets. A corporation in this condition may go on, manage its affairs and transfer its property in the due course of business, whilst there is an honest purpose and reasonable hope of reclaiming its fortunes, though a part of the creditors be thereby deprived of their security. *Pond* v. *Framingham*, 130 Mass. 134; 15 N. Y. 10. But whilst the legal ownership of the assets is not altered by insolvency, the directors of an insolvent corporation will not be allowed to secure a preference to themselves at the expense of other creditors. They are placed, when the company becomes insolvent, in the same fiduciary relation to its creditors in which they originally stood to the members of the corporation. *Hoyle* v. *Railroad Co.*, 54 N. Y. 314; *Bradley* v. *Farwell*, 1 Holmes (U. S.), 433; 21 Wall. 616; *Richards* v. *Insurance Company*, 43 N. H. 263; 28 Cal. 398; 90 Pa. St. 69.

Whilst we recognize and assert these principles, and affirm that the director of joint stock corporations occupies fiduciary relations which cause the courts to view with extreme

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jealousy his dealings with the subject-matter of his trust, and which lead courts of equity, upon slight grounds, where timely application is made by the stockholders or creditors, as the case may be, to set aside conveyances by a corporation to, or for the security of, a director, yet we must also hold, in view of the cases decided in Missouri and elsewhere, that cases may and do arise in which a director may take security from the corporation upon its assets for a loan made by him to it when in embarrassed circumstances; and the deed, though attacked by creditors, may be upheld, as it may also, in view of all the attending circumstances, be upset. But because such a deed may be avoided, it not only does not follow that it is void, but it does follow that it is not void,

We do not feel at liberty to hold that the deed attacked in the present proceeding was void for a constructive fraud. The remedy of the creditors of the corporation, if any they have, was, we think, by a proceeding in equity to avoid the deed, and subject all the property of the corporation to the lien of the creditors. We are of the opinion that the agreed facts do not make out a case of legal fraud such as to make the deed void and to bring it within the provision of the attachment law. The conveyance of property to hinder, delay or defraud creditors which authorizes the seizure of the property conveyed, or of other property of the debtor, by attachment or execution, is such a conveyance as is held to be not merely voidable in equity but utterly void as to creditors, so as to create a resulting trust in their favor, and to constitute the grantee in the deed a trustee for their benefit. *Ryland* v. *Callison*, *supra.* Though the corporation in the present case is admitted by the agreed statement to have been insolvent when the deed was executed, this admission goes only to this, that it was unable at the time to pay its debts as usual. It does not follow that it might not ultimately have a surplus in winding up its affairs. The case may have been no worse for

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the directors than that presented by *Twin-Lick Co.* v. *Marbury* (*supra*); or by *Kitchen* v. *Railroad Co.* (*supra*).

We are of opinion that upon the agreed facts the circuit judge committed no error in finding the issue of fraud in favor of defendant, and the judgment will therefore be affirmed. Judge THOMPSON dissents. Judge LEWIS concurs.

IN RÉ LAURA DOYLE.

June 24, 1884.

1. HABEAS CORPUS — INFANTS — PRACTICE. — The court, in *habeas corpus* directed to a private individual to produce the body of an infant, is bound to release the infant from improper restraint.

2. —— In such a case the court is not bound to place the child in the custody of any particular person, but will exercise its discretion looking to the child's interest under all the circumstances.

3. —— In determining what the child's interests are, the court looks only to its temporal welfare, and disregards all question of religion as affecting its spiritual interests.

4. —— In *habeas corpus* the court can not appoint a guardian, but in making a temporary disposition of the child, if its temporal interests will be as well conserved by giving it in charge of a person of the religious faith of its parents, it will be so disposed of.

APPLICATION for *habeas corpus*.

Custody of the infant given to the petitioner.

A. J. P. GARESCHÉ, for the petitioner.

J. G. LODGE and J. A. TALTY, for the respondent.

BAKEWELL, J., delivered the opinion of the court.

This is an application under the *habeas corpus* act. The petitioner, Emily James, alleges that Laura Doyle, a child of eight years, is unlawfully restrained of her liberty by one William Conn. The name of the respondent is, however, George Conn. He brought the child into court in obedience to the writ. The testimony of witnesses for

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petitioner and respondent was heard at great length. The facts appear to be substantially as follows: —

The petitioner is a Roman Catholic nun, and superior of an educational institution of the highest class, conducted in St. Louis by ladies of a religious order called Sisters of Loretto. The institution in question is a boarding-school for girls. The order, of which petitioner is a member, originated in Kentucky, and has houses in various parts of the United States. Its object is teaching. The sisters in Missouri are an incorporated body under our state laws. The petitioner, Emily James, is known in the order as "Sister M. Simeon." Though superior of the particular institution with which she is connected in St. Louis, she is not at the head of her order, but is herself a subject, and bound by her rules to obey the directions of her superiors, and liable to be ordered away from St. Louis as shall seem best to them.

George Conn, the respondent, is a master mechanic, aged thirty-nine years, earning about ninety dollars a month. He has been married about five years, and is childless. His wife's age is twenty-six. Their home is a modest but comfortable one, and such as might be expected from their position in life. Conn owns nothing beyond the furniture of his house. Both he and his wife have an excellent reputation amongst their neighbors as persons of the best habits. Mr. Conn is a Protestant; but not a member of any Protestant church. He has a general respect for religion; and since his marriage, he and his wife have usually gone to church on Sunday evenings,— now to one Protestant church, and then to another. He is not specially prejudiced against the Catholic religion, and is anti-Catholic only so far as that is necessarily involved in the fact of his being a Protestant. Mrs. Conn was brought up a Catholic, but was married to Conn by an Episcopalian minister, and has not, since her marriage, attended the Catholic church. She still calls her-

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self a Catholic, and says that, if dying, she would send for a Catholic priest.

The child Laura Doyle, the subject of the unhappy controversy, is a bright looking girl, apparently in good health. She was brought into court looking neat and well dressed; and her demeanor in the court-room during the proceedings showed that she was affectionately disposed towards Mr. and Mrs. Conn. We may say here, once for all, that there is no doubt that Mr. and Mrs. Conn and the child love each other dearly.

William Doyle, the father of Laura, is a molder by trade. His wife died nearly four years ago. They had four children: a married daughter, a boy now aged about eighteen, a girl aged now about twelve, and Laura aged now about eight. Doyle has the habit of indulging to excess in intoxicating liquors. He has for many years been in the habit of going on sprees. Between these periods of debauch he abstains from liquor altogether. When his wife died the family was broken up. The two girls at first were placed with their maternal aunt, Mrs. Kelly. But Mrs. Kelly's circumstances were such that it was inconvenient for her to keep the children, and the two little girls were placed by the father in the St. Bridget's Half Orphan Asylum in St. Louis. The father then went to work in another town. He was to pay four dollars a month to the asylum for each of the children; but after a few months he ceased to remit. Nor did he ever come to see his little girls. Twice he set out for St. Louis with considerable sums of money in his pocket, intending to do something towards their support, and on each occasion he got on a spree and lost his money. Doyle and all his family are Catholics. He himself has not attended to his religious duties for years; but he strongly desires that his children should be brought up Catholics, and it was with this view that he placed his children in a Catholic asylum. Two of Doyle's sisters are nuns of the Loretto order, and are in the same house with

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Sister Simeon, the petitioner here. There is nothing to show that Doyle is a man of bad habits, except for his irresistible appetite for liquor, which leads to the occasional sprees of which we have spoken.

St. Bridget's Half Orphan Asylum is one of several asylums in St. Louis, in charge of Catholic nuns, supported partly by Catholic charity, and under the control, to some extent, of a board of gentlemen called the orphan's board. According to the rules of the board, children, when they leave the asylums, are to be placed only in Catholic families. When the children are of age to be of use, it is usual to place them in families, with the understanding that their position is not to be a menial one, but that of members of the families which receive them. It is the custom, before accepting any proposition from a family to receive an orphan, to have a certificate from the priest of the parish in which the family resides, that the heads of the family are practical Catholics.

In October, 1883, Mr. and Mrs. Conn conceived the idea of relieving their childless condition by adopting some child from an orphan asylum. Mrs. Kelly was a neighbor of Mrs. Conn, though they were not intimate. Mrs. Kelly was a Catholic; and to her Mrs. Conn applied for help in carrying out her project. Mrs. Kelly, accordingly, went with Mrs. Conn to various asylums. At St. Bridget's Half Orphan Asylum, they were shown two children, one of whom was Laura Doyle. Mrs. Conn was asked whether she was a Catholic, and said, either that she was, or that she had been raised, a Catholic. There can be no doubt that her answer was intended to convey the idea that she was a Catholic, and that it was so understood. She also said, in answer to a question by the sister in charge, that her husband was not a Catholic, but was not prejudiced against Catholics, and would not object to her raising the child a Catholic, and she promised, in case she was allowed to have Laura, that she would raise her a Catholic. Mr. Conn

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afterwards saw the children, and he stated to the sister in charge that he was not a Catholic, but had no objection to the child being brought up a Catholic. The sister advised him not to take Laura, as she had relatives who might reclaim her. But both Mr. and Mrs. Conn preferred Laura; and, on statements of a similar character to those set out above, they obtained a letter to the asylum from a Roman Catholic clergyman, on the faith of which the child was delivered to them.

Mrs. Conn taught the child some prayers, — amongst others the "Hail Mary," a Catholic and peculiarly un-Protestant prayer; but she gave her no catechetical instruction, never sent her to a Catholic Sunday-school and sent her daily to the public schools, when she was well enough to go, as she usually was. The child never went to a Catholic church, and once, at least, was sent to a Protestant Sunday-school. Mrs. Kelly heard of this, and remonstrated, urging upon Mrs. Conn her promises and those of her husband. Mrs. Conn replied that her husband had changed his mind, and would rear the child as he had been reared. Of all this, the aunts of Laura were informed. They took alarm, and the consequence was the present proceeding.

The father evidently doubted whether the custody of the child would be given to him on an application to the courts, so, after Mr. Conn had refused to give up the child to her aunts, he executed an agreement on the 7th of May, 1884. This agreement is a sealed instrument between himself and Sister Simeon, executed by both. It recites that Sister Simeon is a religious of the order of Loretto, that Doyle is the father of Laura, and unable to take care of her, that Laura's aunt, Catherine, is a member of the same order, and desires him to enter into the agreement, and in consideration of the premises and the stipulations of Sister Simeon, he surrenders to Sister Simeon his parental control over Laura, during Laura's minority, in consideration

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of which, Sister Simeon covenants that she will assume the care and custody of Laura, feed, clothe, educate and maintain her during minority and, so long as Laura will submit to such control, reserving to Laura the right to choose her own guardian at fourteen.

Sister Simeon swore on the witness-stand, that she would carry out this agreement so far as she could; that she had not made it without the previous consent of her superiors, and that, under it, Laura would receive such an education in all respects as is given to the children of wealthy parents attending the Loretto school; that she would be put on an equality with these children, and taught all the usual accomplishments; that, at eighteen, she would be allowed to enter the community as a member of it, if she showed signs of a call to the religious life; that, if she had no such wish, she would then be able to maintain herself as a teacher, and would always have a home at the convent, if out of a place.

William Doyle swore that he desired the child to be placed under the charge of Sister Simeon, and desired in all respects to adhere to the agreement he had made.

Sister Simeon, who seems to be a woman of no ordinary intelligence, and of long experience of girls as a teacher, said that the effect of the separation between Laura and her new friends, the Conns, would probably cost her a pair of red eyes and a headache or two, but would not injure her health; and, as to this, she was corroborated by two of the best known and most respectable physicians of St. Louis.

Mr. Conn testified that the child seems to have a great horror and dislike of going back to St. Bridget's Orphan Asylum. But there is nothing to show that she would have any repugnance to go to Loretto Academy, except so far as she would dislike to leave Mr. and Mrs. Conn, who have been very good to her, and whom she strongly loves.

It is obvious that, whether the child is left with the Conns or placed in the Loretto Convent, her future is, to a certain extent, a precarious one. Mr. Conn, so far, has

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accumulated nothing, and is dependent on his wages for support. He and his wife may die, and they may also have children of their own in the course of nature. On the other hand, Sister Simeon and the aunts of the children, now members of the Loretto order, may die, and all of them may be removed to other and distant fields of labor and duty. It does not appear that the order, or the incorporated society of which Sister Simeon is a member, can adopt children. Nothing of the kind is mentioned in the charter or contemplated in the purposes of the order; and, if the obligations assumed by Sister Simeon should be hereafter repudiated by her associates, it is obvious that they could not be legally enforced in any effectual way.

It is a general rule, applicable to cases of this kind that, in proceedings by *habeas corpus* directed to private persons to bring up infants, the court is strictly bound, *ex debito justitiæ*, to set the infant free from any improper restraint, but is not bound to deliver the child over to any particular person. As to this, the court is vested with a discretion which it should exercise according to the circumstances of each case. It is the benefit of the child that we are first to look at in any order that we may now make as to her disposition. Any order that we might now make as to that would be in its nature temporary. It would not be necessarily, or even naturally, final, however important it might by subsequent circumstances become. The law provides for proceedings for the appointment of a guardian of an infant whose natural guardian can not or will not properly discharge his duties. These proceedings are to be before the probate court, to which court such an appointment is delegated, and it is to that court, or, if the parent demands a jury, as he may do, to a jury to be impaneled in that court, that the law commits the duty of determining whether the father has become an unfit person to have the custody and control of his child. *Ex parte Waldron*, 13 Johns. 417; *Cosmuth* v. *Addicks*, 5 Burn. 520; *Rex.* v. *Delarul*,

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3 Burr. 1436; Schouler's Dom. Rel., sect. 248; Rev. Stats., chap. 37, sects. 2562, 2576.

We can not, in this proceeding, determine the question of guardianship; and whether we shall alter the custody of this child is a matter that rests solely in our sound discretion, which, in such a matter, is not, in America, governed by any wooden rule as to the rights of the father, but is to be exercised on general principles of justice, after full consideration of all the circumstances, and with a view mainly to the child's interest, which we must look upon as altogether paramount to the claims of its father, who is not vested by law with any absolute right to its custody. *United States* v. *Gree*, 3 Mason, 383; 3 Hill, 399; 6 Rich. 244; 3 Ala. 736; 4 Ohio St. 615.

A great deal has been said in the argument as to the religious question. In determining what will be best for the child, we can not, under the system of law which we are appointed to administer, look at that. The state of which we are citizens and officers, does not regard herself as having any competency in spiritual matters. She looks with equal eye upon all forms of a so-called Christianity, and subjects no one to any disability for rejecting Christianity in any form, nor for rejecting the generally accepted doctrines of natural religion. A father in Missouri forfeits no rights to the custody and control of his child by being, or becoming, an atheist, nor are his rights in this respect increased before the law by his believing rightly. The law does not profess to know what is a right belief.

The state of Missouri has, however, a law which forbids the appointment for an orphan, where another suitable person to act as guardian can be found, of a permanent guardian who is of a different religion from that of its last surviving parent. Under this law no doubt, a baptised Catholic, or a Jewish child, might be given up to a guardian who rejected all forms of religious belief; and must be so given up, if the last surviving parent died in the open pro-

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fession of unbelief. The enactment is not made with any view to the eternal interests of the child in a future state of existence, but with a view to the rights and feelings of the parents. We consider that the state has thus a declared policy, which we ought to respect in a kindred case; and that, although the case before us is not precisely that contemplated by the statute, since we are not appointing a statutory or permanent guardian, yet that, so far as the interests of the child are not injuriously affected, we ought to have some regard in disposing of this child to the religion of its parents and the wishes of its last surviving parent as to its religious education, and that the interests of the child itself require that we should have some regard to this.

It is manifest that anything which interferes with the natural right of the father to direct the religious education of his child strikes a blow at the family, which, in the last analysis, is the foundation of the state. Few men would be willing to assume the burdens of a legal paternity, if they supposed that their children could, against their will, be taken from them to be educated in religious systems which they believed to be false, and to be taught thus to despise their father for his superstition, or for his infidelity, as the case might be. To the Protestant, the Catholic religion must be a system of superstition; to the Jew, it must be one of imposture; and, to the unbeliever, the old historic religions of the Jew and Catholic, and the various sects of Protestantism, are alike false, and the profession of any of them a confession, so far, of moral or intellectual weakness. I can conceive no more poignant anguish than that of the true father who sees his child, against his will, brought up before his eyes in a religious system which he abhors, as being, according to his belief, injurious to the spiritual interests of his child; and, if he believes sincerely in any form of religion, his anguish at seeing his child brought up in religious indifferentism can not be less.

To this cry of parental affection it might be our duty, in

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administering the laws of this state, to be altogether deaf, if it should clearly appear that we should be disregarding the best temporal interests of the child in hearkening to it. But, if the temporal interests of the child will be as well conserved by delivering it to the custody of those of its father's faith, we consider that in doing so, we are following out the policy of the law as declared by the statute before referred to.

The child is not at an age when impressions made are deep and permanent. If we refuse this application, she may remain long in the custody of persons who, however moral and attached to her, and capable of supporting her comfortably according to her state of life, are confessedly indifferent in matters of religious belief, one of them regarding all religions as very much alike, and the other having so weak a belief in the form of Christianity in which she was educated that she received what is regarded by the believers in that creed as a sacrament, at the hands, or (if he is not to be regarded as the minister of it), at least in the official presence, as a minister of religion, of a clergyman of a hostile religious body, and has for years abandoned all outward profession of her belief, and all attendance upon its services, and all use of the ministrations of her church, and habitually attended other services.

Beyond teaching her a short prayer or two, the child received no religious instruction from Mrs. Conn. She has been permitted to go to receive religious instruction in the Sunday-school of a religious body which is not that to which her father belongs. There can be no reasonable security felt that this state of things may not continue, and every hour that she remains with these kind people must necessarily deepen her attachment to them, and make the separation more painful, should a guardian be appointed, according to law, of her father's religion. Such a guardian, upon his appointment, would probably remove her from them.

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For myself, I incline to think that, in one point of view, it might be better for the little girl that she should be brought up in the house of a decent, honest mechanic, according to her state of life, than that she should go to a boarding-school to learn (in addition, of course, to those useful and necessary things which will be thoroughly taught her there), a lot of frivolous accomplishments such as often unfit our young women for the sober duties that they must perform as wives, and which, in many cases, are entirely unsuited to the state of life in which they come into the world, and in which they are to be established in it. But, on the other hand, she will be with her kindred, will be taught the religion of her kindred, and, so far, will be in her natural position. If, by the form of her education, she is to be somewhat elevated above this position, it will commonly be thought that this is a positive advantage; and it can not be denied that, so far as the accomplishments which she will learn at the convent will furnish her with a means of making an independent living when she leaves it, they will be a great advantage. As to this, there is testimony that they will furnish her with such a means of subsistence. Such, at least, is the opinion of Sister Simeon, who has exceptional opportunities of judging as to that. It can not be doubted that the child will have at the Loretto Academy the kindest and most careful moral training; and if she, remains there long enough, we must believe that, if she proves an apt and diligent scholar, she may be taught there what perhaps she can maintain herself by teaching in her turn, when her education is accomplished. It would be a temporal disadvantage to her to be brought up in a religion which would tend to separate her from those of her own blood, who, on both the father's and the mother's side, are all Catholics — and Irish Catholics — that is to say, Catholics of the very strongest hereditary faith.

That the child has become attached to those with whom she has been for the past nine months, and that their heart-

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strings will be wrung when she is lost to them, is matter for consideration, and might be a very important element in deciding this case were it apparent that the separation would make her permanently unhappy or injure her health, or if the father had voluntarily placed her with them, or consented to her being there. But, the evidence is, that the separation will not injure the child's health, and experience teaches us that such sorrows, at the tender age of this child, soon pass away. The old love of childhood readily yields to the new. As to the second point, the father placed the child in a Catholic institution from which she was removed without his consent. And she was delivered to her present custodians on a misapprehension of the facts, for which we can not but regard Mrs. Conn as, to a great degree, responsible. We do not believe that Mr. Conn made any intentionally false representations, and will now say that the impression made upon us by his demeanor on the witness-stand was in the highest degree favorable to him. He impressed us as a candid, honest, straightforward, intelligent man — one to make a model father. We say this because we think that he was treated with unwarranted harshness during the proceedings by counsel for the petitioner. We think that he was in no degree impeached in his statements, and that the repeated declarations of counsel for petitioner that he would be shown to have perjured himself, were not borne out by any evidence in the case. Any apparent contradictions in his statements were of that character which, to the experienced and careful lawyer, tend to show, not that the witness lies, but that he is telling the truth to the best of his ability and recollection, and not swearing to a previously prepared tale.

The father has not, by his agreement with Sister Simeon, parted, and in our opinion he could not by any such agreement, wholly part, with his rights as a father. It is he, through her, that is endeavoring to replace the child in a

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condition as to her religious education similar to that in which he originally placed her. He desires that she should be placed with Sister Simeon as her teacher; and we see no sufficient reason why no respect whatever should be paid to his wishes in this matter. So far as these are not inconsistent with the interest of the child, we think we ought to regard them. We can not agree with counsel for respondent that the father is shown to have emancipated the child. He has, owing to his unhappy passion for strong drink, violated his duty as a father, whether he has shown himself wholly unfit to have any control of her, we are not now to decide. That question may come up upon application to remove him and appoint a guardian; but any such application must be made in the probate court, and the father will then be entitled to a jury to pass upon the question of his unfitness to have custody of his child. Meanwhile, we are not asked to remit the child to its father, but to deliver her up, until some further steps are taken by her friends, to the charge of an eminently experienced superior of an excellent boarding-school for girls, who is of her own religion, and of the religion of both her parents, and, so far as it appears, of all her relatives, and whom the father designates as the person whom he desires to assume control of the child, at least for the time being. We have in view the fact that, should the father be found, in the proper proceeding, unfit to have control of the girl, a guardian of his religion, must, if a suitable person be found, be appointed under the statute, and the removal from her present surroundings, which woulp then probably occur, would be more painful both to respondents and to the child, and more likely to prove injurious to the child, than a change now made.

We have carefully considered the brief of respondent's counsel, and, if we do not refer to it in a more particular manner, this is only because it has already been found necessary to extend this opinion to great length in the statement of the grounds and reasons of our judgment. The case

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before us has a peculiar feature owing to the provision of the Missouri statute to which we have before referred.

After giving to this case the most careful consideration, and allowing, as we think, due weight to everything in the way of evidence, argument, or authority that has been laid before us, we have arrived at the conclusion that we shall best consult the interests of the child by remitting her now to the custody of Sister Simeon, in accordance with the wishes of her only surviving parent, which wishes we have felt that we had, under the circumstances, to regard in some degree in arriving at this determination.

Immediately before this application to us, a similar application had been made to the circuit court. Judge Thayer, on that hearing, felt it to be his duty to remand the child to the custody of Mr. Conn. This action of that very able, dispassionate, and learned judge has had its weight with us, and we have read with care the written memorandum of the grounds of his judgment that he handed down on remanding the child, and have also examined the cases to which he there refers, and the effect of which he apprehends precisely as we ourselves do. We do not know what evidence was introduced before Judge Thayer, and this, of course, is entirely an independent proceeding, and one in which we by no means review his action.

We think that the child should be taken from the custody of the respondent and delivered to that of the petitioner. It is so ordered. Judge Thompson did not sit. Judge Lewis concurs.

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M. Holland, Respondent, *v.* West End Narrow Gauge Railway Company, Appellant.

June 24, 1884.

1. Damages — Pleading — Railroads — Stock. — A petition in an action under section 809 of the Revised Statutes against a railroad company for killing stock, which does not aver that the killing did not occur within an incorporated town, is not sufficient.

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2. —— REPEAL OF STATUTES.—The stock law (Rev. Stats., p. 1550) does not repeal the statute which requires railroad companies to fence their roads.

3. —— TRESPASS—FENCES.—The trespass, if any, of cattle is not a defence to an action for their death against a railroad company where they enter upon the road from the owner's premises by reason of the company's failure to fence its road.

APPEAL from the St. Louis County Circuit Court, EDWARDS, J.

Reversed and remanded.

M. F. TAYLOR, for the appellant: There is no allegation that the cattle strayed on the track because of a failure upon the part of defendant to fence its roadway. This is essential.—*Luckie* v. *Chicago and Alton Ry. Co.*, 67 Mo. 245; *Johnson* v. *St. L., K. C. & N. Ry. Co.*, 76 Mo. 554; *Cunningham* v. *H. & St. Joe Ry. Co.*, 70 Mo. 202; *Sloon* v. *Mo. Pac. Ry. Co.*, 74 Mo. 47. There is no allegation that at the point where the road was unfenced, was not within an incorporated city. This, also, is essential.—*Rowland* v. *St. L., I. M. & S. Ry. Co.*, 73 Mo. 619; *Schutte* v. *Railroad Co.*, 76 Mo. 325.

G. W. ROYSE, for the respondent: The petition is good.—*Rowland* v. *I. M. & S. Ry. Co.*, 73 Mo. 619; *Luckie* v. *Railroad Co.*, 67 Mo. 245; *Cunningham* v. *Railroad Co.*, 70 Mo. 202; *Schutte* v. *St. L., I. M. & S. Ry. Co.*, 76 Mo. 324. If a material averment is not expressly averred in the pleadings, but is necessarily implied from what is stated therein, the defect is cured by verdict in favor of party so pleading.—*Grove* v. *The City of Kansas*, 75 Mo. 672.

LEWIS, P. J., delivered the opinion of the court.

The petition avers that, in the county of St. Louis, at a point on the track of the defendant's railroad, "where the same passes along and adjoining an enclosed and cultivated field and unenclosed lands, and not a private or public crossing of said railroad, the defendant, by its agents and

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servants, running its locomotive engines and trains of cars, ran the same upon and over" the plaintiff's cattle, described, "and then and there killed said cattle. That said defendant has failed to erect and maintain good and sufficient fences on the sides of its road, at the point where said cattle strayed upon its (defendant's) track and were killed. By reason whereof the plaintiff states that, by the act and default of the defendant herein, he has been dam aged in the sum of," etc. At the trial, the defendant objected to the introduction of any evidence by the plaintiff, on the ground that no cause of action was shown by the petition. The objection was overruled, and the defendant renewed it, after the verdict, by a motion in arrest, which was also overruled. There is no direct averment in the petition that the stock were not killed within the limits of an incorporated town. In *Rowland* v. *Railroad Co.* (73 Mo. 619), the complaint charged that the killing was done where the railroad "was not fenced, and where there was no public or private crossing on said railroad." In holding that this was insufficient, Judge Sherwood said: "From aught that appears in the amended statement, the killing may have occurred within the limits of some incorporated town, where neither the law would require, nor the corporate authorities permit the defendant to fence its road." If this ruling stood alone, there might be some room for an argument that nothing more was intended than a strong showing of the insufficiency of a statement which failed to set forth the conditions of liability exacted by the terms of the statute. But the supreme court itself has given us a much more comprehensive interpretation of that ruling. When the pleader, following the words of the statute, says that the several wrongs and derelictions occurred at a place where the road passes "through, along, or adjoining enclosed or cultivated fields or unenclosed lands," we are not at liberty to infer, without a direct averment, that this was not "within the limits of an incorporated town." In *Schulte*

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v. *Railroad Co.* (76 Mo. 324), the former decision is interpreted as holding that "a statement, to be sufficient, * * * *must aver* that the stock were not killed within the limits of an incorporated town." This interpretation binds us, and we must, therefore, hold that the petition in this case is insufficient. Further following the last mentioned decision, we will remand the present cause, in order that the plaintiff may properly amend his petition.

A question is presented in this case as to the effect of the St. Louis County stock law, upon the responsibility of railway corporations for failing to fence their roads. We do not perceive that the stock law of 1877 (Rev. Stats. 1550) repeals the statute which requires railway companies to fence their roads or in any way relieves them of responsibility for failing to do so. The stock law makes it unlawful for any animal of the species mentioned "to run at large, or outside of the enclosure of its owner, or to be herded on land other than that of its owner." It is argued, hence, that even if the company fails to fence, and a cow gets upon the road and is killed by the locomotive, there can be no liability, because the cow was a trespasser. But this argument overlooks the important fact that the enclosure of the owner is required by law to be provided in part by the railway company. Rev. Stats., sect. 809. If the company fails to perform this duty by reason whereof an animal gets on the track from its owner's adjoining lands, the trespass, if any, is a direct result of the company's dereliction. The company can not, by setting up such a trespass in defence, make advantage of its own wrong. There is no inconsistency between the railway fencing law and the stock law, and no repeal of either, by implication or otherwise. Both can be enforced and stand together. While the stock owner is required to keep his cattle within enclosures, the railway corporation is commanded to help him do so, to the extent of so much of the enclosure as lies along the railway. The penalty for failure to contribute in this way is

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distinctly declared in the statute, and can not be frittered away by ingenious reasoning.

In conformity with the decision in *Schulte* v. *Railroad Co.*, above cited, the judgment is reversed and the cause remanded. All the judges concur.

L. A. HENLEY ET AL., Appellants, *v.* S. W. KINLEY ET AL., Respondents.

June 24, 1884.

RECORD — EVIDENCE — JUDGE'S MEMORANDUM. — The judge's memorandum on his trial docket is not a part of the record, and can not, at a subsequent term, be used to contradict the record entry of the judgment, which is conclusive.

APPEAL from the St. Louis County Circuit Court, EDWARDS, J.

Affirmed.

M. F. TAYLOR, for the appellants: The clerk having entered up a judgment not rendered by the court, the entry may be so amended as to correspond to the facts even at a subsequent term. — *Fletcher* v. *Coombs*, 58 Mo. 430; *Jones* v. *Hart*, 60 Mo. 350; *Balkins* v. *Rhodes*, 76 Mo. 676; *Woodridge* v. *Quinn*, 70 Mo. 370.

H. D. WOOD and J. W. MCELHINNEY for the respondents: The judge's memorandum could not remove the presumption in favor of the record. — *Allen* v. *Sales*, 56 Mo. 28; *Woolridge* v. *Quinn*, 70 Mo. 370; *Jones* v. *Hart*, 60 Mo. 351; see *Robertson* v. *Neal*, 60 Mo. 579.

LEWIS, P. J., delivered the opinion of the court.

The record shows the following facts: The plaintiffs filed their petition praying that certain conveyances be set aside for fraud. Two of the four defendants answered,

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setting up, among other defences, a plea of *res judicata*. The plaintiffs demurred to this defence, and filed a reply to other matters contained in the answer. The court overruled the demurrer; "and thereupon the plaintiffs, by their attorneys, electing to abide by their said demurrer, say they will not further plead or reply to the said answer. It is therefore ordered, adjudged, and decreed by the court that the bill of plaintiffs be dismissed, that the said plaintiffs take nothing by their said suit," etc. * * * Such is the entry of final judgment. At the next subsequent term of the court, the plaintiffs filed their motion for an amendment of the record, so as to make it show that the demurrer was sustained, instead of being overruled, and that no judgment was rendered against the plaintiffs, as recorded. In support of this motion, it was shown that, on the judge's docket opposite the entry of the demurrer, the memorandum "sust." appeared in the handwriting of the judge, and that this was the customary formula for indicating his conclusions when a demurrer was sustained. Against the plaintiffs' objections, the defendants were permitted to prove by one of the attorneys for the plaintiff, that, as such attorney, he had agreed with the defendants' counsel before the decision upon the demurrer, that that decision should determine the cause, and that a final judgment should be rendered, to follow the disposition of the demurrer. The court overruled the motion and the plaintiffs appealed.

The statement of the controversy seems to announce its only possible conclusion. The judge's memorandum on the docket was no record, or any part of a record. As evidence, it was entitled to no more weight than his oral statement would have, after the event. In arraying this against the highest form of evidence, the traditional verity of the record seems to have been lost sight of. The record was conclusive, and could not be thus contradicted at a subsequent term. The plaintiffs were not prejudiced

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by the admission of the attorney's testimony. The case against the motion was fully made without it, and its only tendency was to sustain the record.

The plaintiffs contend that, as a proposition of law, the demurrer ought to have been sustained; from which it follows that the record should have been amended, so as to show that it was sustained. If the proposition of law be correct, then there was error in the judgment of the court. But error can not be corrected by impeaching its record. An appeal, or writ of error, is the instrumentality for such a purpose. The judgment is affirmed. All the judges concur.

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ISABELLA H. VALLÉ, Respondent, *v.* JOHN R. PICTON, Appellant.

June 24, 1884.

1. PRACTICE — MOTIONS.— A clearly frivolous motion may be overruled immediately, notwithstanding the statute which requires that motions shall be filed at least one day before they are determined.
2. —— ATTORNEY AND CLIENT.— An affidavit in support of a motion to dismiss on the ground of want of authority in the attorney to begin the suit, which states only the affiant's belief, does not tend to overcome the presumption arising from the professional obligation of the attorney, and such motion may be summarily overruled.
3. CONTRACTS — CONSIDERATION. — A promise conditioned upon a release to the promisor of an interest asserted by the promisee, but not conceded by the promisor, is supported by a sufficient consideration.
4. —— A promise conditioned upon the conveyance to the promisor of a possible interest which he believes the promisee has, but which the latter does not claim, is supported by a sufficient consideration.

APPEAL from the St. Louis Circuit Court, LUBKE, J.

Reversed and remanded.

JOHN M. HOLMES and E. A. B. GARESCHÉ, for the appellant: A defendant is not bound to answer a suit begun without the plaintiff's authority. — Weeks on Attorneys,

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sect. 200. If the attorney, after a motion to dismiss is made, and after a reasonable notice of it, fails to show his authority the court shall dismiss the suit. — Weeks on Attorneys, sect. 214, p. 370; *Turner* v. *Caruthers*, 17 Cal. 433; *McKernan* v. *Caruthers*, 4 How. (Miss.) 333. A promise is a sufficient consideration for another promise. — 1 Pars. on Con. bottom p. 470; *s. c.* 9 Bing. 68; *Mississippi Bank* v. *Sabin*, 48 Vt. 329; *Moss* v. *Green*, 41 Mo. 389.

McKeighan & Jones, for the respondent.

Lewis, P. J., delivered the opinion of the court.

The petition contains two counts on promissory notes, and one for money paid by the plaintiff to the defendant's use. The verdict and judgment were for the plaintiff on all the counts.

The amended answer alleges that the defendant's former wife, a daughter of the plaintiff, had sued him for divorce, in which suit he had filed an answer and cross-bill. That, during the pendency of that proceeding, the present plaintiff and defendant entered into an agreement, by which the plaintiff was to cancel and surrender to the defendant the notes here sued on, and was to release him from all liability on account of the matters charged in the petition, and was further to pay the defendant the sum of $8,500 in cash, upon the execution of a conveyance by him to his said wife, at the termination of said suit — whether the decree rendered therein should be in favor of one party or the other — of all his marital rights, claims, and demands, and of all rights, claims, and demands, of whatsoever nature, in and to the property of his said wife. That in accordance with said agreement, upon the termination of the divorce suit, the defendant executed and delivered the conveyance stipulated for, and the plaintiff paid him the sum of money promised; but through accident, mistake, or oversight, the said notes and evidences of indebtedness were not

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cancelled or surrendered, as had been agreed upon. A reply put these allegations in issue.

On May 12, 1882, the defendant filed his motion for a dismissal of the cause, "because the same has been instituted and is prosecuted without the knowledge, consent, or authority of the plaintiff." This motion was supported by the defendant's affidavit to the effect that "he has good reason to believe and does believe, and does so aver, that the above entitled cause has been begun by Henry A. Clover, the attorney herein, without the knowledge, sanction, or authority of the plaintiff herein, and against her wishes. And he does believe, and does so aver, that if advised thereof, she would not sanction the same." No other affidavit or proof was offered in support of the motion, nor was any leave asked for or given, to file additional proofs. On the same day the motion was overruled. There were some irregularities in this proceeding, but on the whole we do not perceive any error which would justify a reversal. By Revised Statutes, section 3558, "motions in a cause filed in term, shall be filed at least one day before they may be argued or determined." The law, on its face, imposes a duty of diligence on the party filing the motion. At the same time it secures to both parties the benefit of one entire day's preparation for the argument and submission. If the position of the case on the docket will admit of the statutory delay it would be a wrong against the mover, as well as against the adverse party, to pass upon the motion without that delay, unless this is consented to at the time. But if the motion be manifestly insufficient on its face and not entitled to serious consideration, by reason of its inherent irrelevancy or frivolousness, there can be no such error as would be fatal to a judgment, in disposing of it at any time. The customary rule in practice requires that affidavits or other proofs in support of a motion must be filed with it; otherwise, leave must be obtained at the time to file them within a specified time afterwards. If no such leave be given, the motion must be disposed of as

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it stands, with its accompanying proofs, at the time of filing. The motion and affidavit, in the present instance, were wholly insufficient for the object sought. There is a legal presumption arising from professional obligations resting upon every attorney in good standing, and from the oath he has taken, that he will not abuse his privileges by bringing any person into court as a party without authority from that person so to do. This presumption, to be effectually rebutted, must be met by something more than mere belief — however honestly entertained, and upon whatsoever undisclosed reasons seeming sufficient to the believer — that the attorney has been guilty of a professional malfeasance. The "suitable suggestion" referred to in *Keith* v. *Wilson* (6 Mo. 439), must be some showing of specific facts, from which the court itself may be induced to doubt the attorney's authority to appear for the party. In that case, as well as in the others cited, there was a very complete showing of such facts. In the present case the motion to dismiss, as presented, was wholly insufficient on its face, and must have been overruled, whenever and however reached.

We here copy from the statement filed by the respondent, so much of the testimony as seems to be material to our present purpose: —

"John R. Picton, the appellant, testified substantially that during the pending of the divorce suit he had no conversation with Mrs. Valle. Had conversation with Judge Clover, attorney for his wife, Mrs. Zoe Vallé Picton, in her suit for divorce against the witness at the office of appellant in May, 1881. Judge Clover stated (says the witness) that if he would withdraw certain accusations in the pleadings, that his client's (Zoe Vallé Picton) friends would assist him financially. Witness referred Judge Clover to his attorney with respect to the matter. Witness stated to Judge Clover that he did not want to make any money out of it. He wanted to pay some obligations and be released from all con-

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nection with the family. Judge Clover brought up the fact, that he (the witness) owed Mrs. Vallé a large sum of money, which the agreement would wipe out, and the whole thing would be settled quietly. All the obligations between myself and the family, and the connection were to be severed permanently in every respect. He (Judge Clover) said that whatever arrangement was made, that I would be expected to sign a deed releasing all my right, title and interest in my wife's property.

"Had no further conversation with Judge Clover in regard to that matter until after the divorce was granted, then he approached me about signing the deed, and said he was waiting for my signature. Signed the deed and delivered it and the cash money was paid by Mr. Finkelnburg. Mr. Garesché, the witness, and Judge Clover were present when the money was paid."

There was other testimony which tended to show that an agreement was finally made between the attorneys of the parties, respectively, whereby the defendant was to surrender, by conveyance, all interest in his wife's property, and the plaintiff was to pay him $8,500; and that these conditions were finally consummated by the parties on both sides. It was also shown that in the year 1874, long before the commencement of the divorce suit, the defendant and his wife had conveyed to the plaintiff as trustee, for the use of the wife, all her property rights, and whatever interest he had or could have in the same.

Of the instructions given for the defendant, one, numbered 2, was as follows: "The court instructs the jury that the execution and delivery of a deed furnishes a sufficient consideration for a promise, whether the grantor in the deed had or had not any interest in the property conveyed, or sought to be conveyed thereby." The court gave, also, of its own motion, the following: —

"Of its own motion the court instructs the jury that the deeds read in evidence here, and admitted to have been

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executed and delivered by the defendant to a trustee for his wife, before the commencement of the proceedings for divorce, passed out of the defendant all interest which he then had in his wife's estate, and barred him from asserting thereafter, in virtue of his marriage, any interest in any estate which his wife might thereafter acquire. To authorize a finding (under defendant's instruction No. 2, given by the court) that the deed executed and delivered by the defendant after the termination of the divorce suit, furnished a sufficient consideration to support the alleged agreement for the surrender by the plaintiff of the notes and causes of action here sued upon, the evidence should satisfy the jury that, notwithstanding the prior deeds hereinbefore mentioned, the defendant asserted, and the plaintiff conceded, that the defendant upon the termination of the divorce suit, might have some interest in his wife's property then in possession, or thereafter to be acquired, which the deed to be delivered under the agreement would deprive him of. The evidence must satisfy you that this assertion and concession were in good faith to give an actual and not a colorable consideration for the agreement. And if you believe, from all the evidence and circumstances given in evidence here, that such consideration was only pretended, and that the real consideration for such agreement (if you find the same was made by the plaintiff's agent for her and with her authority), was, that the defendant would withhold an answer in the suit for divorce, which, if filed and pressed, would have defeated her application for the divorce, or would have shown that she was not an innocent and injured party, then such agreement was utterly and wholly void, on the grounds of public policy, and you should find against the defendant."

The defendant was entitled to all the benefit of his own testimony to the effect that the agreement in contemplation, if made, was to "wipe out" his indebtedness to the plaintiff. There were some conflicts in the testimony on this point, but the defendant was none the less entitled

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to have the jury properly informed as to the true legal conclusion, if they believed his testimony. The court told the jury, in effect, that the defendant was entitled to no benefit of the understanding claimed by him, unless there was a sufficient consideration in his undertaking to convey all interest held by him in his wife's property; and that there could be no such sufficient consideration, unless "the defendant asserted, and the plaintiff conceded, that defendant, upon the termination of the divorce suit, might have some interest in his wife's property," etc. We do not think that this is the law. It could not be necessary both that the defendant should assert, and the plaintiff concede, the proposition stated, in order to create a consideration for a promise. If the defendant asserted an interest and the plaintiff refused to concede it, but did, nevertheless, make a promise, conditioned upon the defendant's surrender of his alleged interest, the promise would be binding; on the other hand, if the defendant asserted no interest, or believed that he had none, while the plaintiff, acting upon a supposition that there might be some interest remaining in the defendant, induced him by a promise to convey away his possibilities, such a promise would be founded on a consideration sufficient to make it binding. "For it is a perfectly well settled rule that if a benefit accrues to him who makes the promise, or if any loss or disadvantage accrues to him to whom it is made, and accrues at the request or on the motion of the promisor, although without benefit to the promisor, in either case the consideration is sufficient to sustain *assumpit.*" 1 Pars. on Con. 431.

Mr. Garesché testified that, as counsel for defendant in the divorce suit, he was opposed to the setting up of a defence proposed by Mr. Picton, and so "obtained permission to confer with Judge Clover, to stop it, and to see if we could not make an arrangement which, while it would not be collusive in the eye of the divorce law, at the same

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time would sweep away from the public scandalous matter, and bring the parties to a quiet settlement. Witness urged Judge Clover that it was proper to avoid the scandal, and to arrange it." From this and other testimony in the cause, it was possible for the jury to infer that what was said about withholding the defence talked about, constituted no part of the agreement finally entered into with reference to money affairs and indebtedness, but was founded upon a desire on both sides to avoid a possible scandal. If they did so infer, then their finding against the defendant must have been based upon that part of the instruction which we have found objectionable. In any event, we are not at liberty to say that the verdict was not controlled by the erroneous ruling. The judgment, therefore, can not be allowed to stand.

Some other points are made on alleged errors in the proceedings below, but inasmuch as the same matters are not at all likely to arise in any further disposition of the cause, there is no need of elaborating them here. For error in the instruction given, as stated, the judgment is reversed and the cause remanded. Judge THOMPSON concurs; Judge BAKEWELL not sitting.

G. W. WILLIAMS, Jr., Respondent, v. A. R. NEWCOMB, Appellant.

June 27, 1884.

1. **EJECTMENT—SUIT TO QUIET TITLE—BAR TO ACTIONS.—A suit to quiet title, subsequently dismissed on the pleadings, by A against B, in which B alleges title in C, is not a bar to a proceeding in ejectment.**
2. **—— UNLAWFUL DETAINER—EVIDENCE—RES JUDICATA.—A former recovery in unlawful detainer by the defendant in ejectment against the plaintiff, is inadmissible to support a plea of *res judicata* as to the issue in ejectment.**

3. EVIDENCE — HEARSAY. — Hearsay evidence may be admissible to establish pedigree.

APPEAL from the St. Louis Circuit Court, LUBKE, J. *Affirmed.*

T. A. RUSSELL and E. P. JOHNSON, for the appellant: The judgment in the suit to quiet title was improperly rejected when offered in evidence. — *Strong* v. *Insurance Co.*, 62 Mo. 295. In equity the dismissal of a bill on hearing is always a final judgment, and a bar between the parties (Freem. on Judg., sect. 270); and in cases at law, where the dismissal or other order is on the merits of the case, it is a final and binding judgment, notwithstanding any informality of the entry. — *Leete* v. *Sherwood*, 21 Cal. 151–164; *Campbell* v. *Mayhugh*, 15 B. Mon. 145; *Zoller* v. *McDonald*, 23 Cal. 136; *Black* v. *Rogers*, 75 Mo. 441; *Granger* v. *Singleton*, 32 La. An. 898; *Best* v. *Hoppie*, 3 Colo. 137; *Elwell* v. *McQueen*, 10 Wend. 519; *Zimmerman* v. *Zimmerman*, 15 Ill. 84; *Gillilan* v. *Spratt*, 8 Abb. Pr. (N. S.) 14; *Brown* v. *Kirkbride*, 19 Kan. 588; *Spurlock* v. *Missouri Pacific Railway Co.*, 76 Mo. 67; *Tutt* v. *Price*, 7 Mo. App. 197. And further, privies in blood, in estate, or in law, are estopped from litigating that which is conclusive upon him with whom they are in privity, so that this plaintiff is barred by the proceedings against his grantors, as effectually as if he had been a defendant in the proceedings. — *Cooley* v. *Warren*, 53 Mo. 169; *Strong* v. *Phœnix Insurance Co.*, 62 Mo. 295; *Crispen* v. *Hannavan*, 50 Mo. 418; *Chouteau* v. *Gibson*, 76 Mo. 38, 46, 47; *Landis* v. *Hamilton*, 77 Mo. 554–565; *Henry* v. *Woods*, 77 Mo. 277–280. Recitals in a deed are incompetent to prove pedigree. — *Fine* v. *Public Schools*, 30 Mo. 166; *Fort* v. *Clark*, 1 Russ. 601; *Slaney* v. *Wade*, 1 M. & C. 338; 2 Whart. on Ev., sect. 1042, note 6; 1 Taylor on Ev., sect. 80: 1 Greenl. on Ev., (13th ed.) sect. 23, p. 29, note 2; *Murphy* v. *Loyd*, 3 Whart. 538; *Clevinger* v. *Hill*, 4 Bibb, 498; *Hill* v. *Draper*, 10

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Barb. 462; *Hardenbürgh* v. *Larkin*, 47 N. Y. 111, 112; *Yahoola Mining Co.* v. *Jobey*, 40 Ga. 479; *Hanks* v. *Philips*, 39 Ga. 550; *Carver* v. *Jackson*, 4 Pet. (29 U.S.) 83.

FREDERICK A. CLINE, for the respondent: The judgment in unlawful detainer was not a bar to the action of ejectment. — *Carter* v. *Scoggs*, 38 Mo. 302–305. The recitals in the deed were properly admitted to prove pedigree.—*Jackson* v. *Cooley*, 8 Johns. 128; *James* v. *Letzler*, 8 W. & S. 192; *Bowser* v. *Cravener*, 56 Pa. St. 132; *Scharff* v. *Keener*, 64 Pa. St. 376; *Doe* v. *Phelps*, 9 Johns. 169; *Little* v. *Pallister*, 4 Greene (N. J.), 209. Hearsay evidence was properly admitted for the same purpose. *Birney* v. *Hann*, 3 A. N. Marsh. 323; *McReynolds* v. *Longenberger*, 57 Pa. (7. P. F. Smith) —; *B. Eaton* v. *Tallmadge*, 24 Wis. 217; *In re Hall's Deposition*, 1 Wall. 85; *Gregory* v. *Baugh*, 4 Rand. 611; *s. c.* 2 Leigh, 665; *Jackson* v. *Cooley*, 8 Johns. 128.

LEWIS, P. J., delivered the opinion of the court.

This is an action of ejectment. It is admitted that the title of the premises sued for was in Zachariah Wilson, who died in 1836. At a period of his life, his marriage relations were somewhat mixed, so that the plaintiff in this case finds grounds for asserting that David S. Wilson (born in Maryland prior to 1815) was his son and only heir, while the defendant claims that he left a daughter, Cynthia E. (born in Missouri in 1820), who married Abner W. Dyer in 1836, and died in 1869, leaving children and her husband surviving; and that the husband died in 1870. The plaintiff claims possession in a chain of grantors and grantees, reaching down to him, under a color of title derived from David S. Wilson, for a length of time sufficient to ripen it into a complete title. The instructions given to the jury fairly submitted the proper hypotheses which should sustain this claim under the statute of limitations, unless the several defences which will be hereinafter noted, or some of them,

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may be found sufficient to defeat it. Verdict and judgment were for the plaintiff.

Before the commencement of the present suit, this defendant instituted a proceeding, under Revised Statutes, section 3562, against parties under whom the plaintiff claims, "to quiet title." Pending that proceeding, the defendants therein conveyed to the present plaintiff. Their answer set up that conveyance, alleging that they now claimed no further interest in the land. The court dismissed the suit on the face of the pleadings; it appearing therefrom "that the defendants in this cause have not alleged any title to the property in controversy." The defendant here seems to be of opinion that that proceeding and dismissal should somehow operate as a bar to the present suit. Upon what reasonable ground such an opinion may rest, we are unable to perceive. The doctrine of *lis pendens* operates to secure to a party the fruition of a right in litigation, if the final judgment shall be in his favor. If, in the proceeding to quiet title, there had been a judgment directing the defendants to sue upon their alleged title within a time limited, or be forever barred, the law of *lis pendens* might perhaps have been invoked to impose a like duty, or alternative disability, on the defendant's grantee, who became such pending the litigation. But no such judgment was rendered, nor any judgment which determined any right, except as against the plaintiff therein (defendant here) to compel the institution of a suit. Both parties were left where they were at the beginning. The then defendants distinctly announced their transfer, and the court properly refused to compel them to sue upon a title which they no longer held.

The then plaintiff, instead of following up the transfer, and making the transferees parties, submitted to the dismissal, and went out of court without any adjudication of the rights claimed. It is a waste of time to discuss the proposition, that such a procedure could leave any trace of influence to affect a subsequent suit in ejectment.

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On November 29, 1881, the present defendant instituted forcible entry and detainer against the present plaintiff, laying possession and entry on the day next preceding. His suit was sustained in a final judgment of the circuit court, rendered on May 17, 1882. We are asked to say that this proceeding should be entertained in the defence of *res judicata*, against the present suit in ejectment. This is impossible. Actual possession of real property is one thing. The right of possession, founded upon ownership, is another thing. Forcible entry and detainer may determine the first of these, but never the second. If the question here were, whether, on November 28, 1881, the defendant was in actual and peaceable possession of the premises sued for, he could point triumphantly to his judgment in forcible entry and detainer, as a conclusive answer in his favor. But that is not an issue in the present case' and has not the least relevancy to the matter in litigation. It might, indeed, have a very remote bearing in favor of the plaintiff's case, since he must prove, in order to recover, that the defendant was in actual possession when this suit was begun. According to the evidence, the instructions and the findings of the jury upon them, considered together, the prior possession of the plaintiff and those under whom he claimed, had ripened into a title several years before November 28, 1881. The judgment in forcible entry and detainer, therefore, antagonizes this, only in so far as to show that the defendant had the possession, while the plaintiff had the title, to wit, on the date just mentioned. There is nothing in the defence.

Objection was made to the admission of a recital in a deed from David S. Wilson to one of the grantees under whom the plaintiff claims, as evidence that he was a son of Zachariah Wilson, and to the admission of certain ancient affidavits and other papers found among the effects of Zachariah Wilson, after his death, by his legal representatives, all of which tended to establish the same fact. So far as

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we can discover, these papers were all within the exceptional rules of evidence relating to pedigree. But, were they not strictly admissible under those rules, upon a direct issue of inheritance, they might still be properly introduced to sustain a mere color of title, so as to vitalize the statute of limitations. This, of course, does not require an unquestionable title in the grantor under whom the party in possession claims. Said the court, in *Jackson* v. *Cooley* (8 Johns. 128): "Testimony as to pedigree is not to be tested by the ordinary rules of evidence. The subject necessarily requires relaxation of those rules; and it is of course always treated as an excepted case. Hearsay evidence, or anything which shows a general reputation, is admissible to establish pedigree. The declarations of persons who from their situation were likely to know, are competent evidence; and so, too, the recitals in deeds, though not admissible in other cases, are competent to prove pedigree." We do not perceive that there was error in the admission of the testimony here complained of.

The defendant asked for twenty-five instructions, which cover fifteen pages of the transcript. Of these, nine were refused, and six were given with modifications, to which the defendant excepted. If all had been free from objection, we might be disinclined to reverse a judgment, because of the court's refusal to burden a jury with such a weight of legal disquisition, in a case involving no difficult complications of title. We have, however, patiently examined all the instructions, given and refused, and find that the court's action upon them placed the case as fairly as possible before the jury, and excluded nothing to which the defendant was properly entitled. With the concurrence of all the judges, the judgment is affirmed.

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THE STATE OF MISSOURI EX REL. D. C. THATCHER, *v.* W. H. HORNER, JUDGE, Respondent.

June 26, 1884.

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1. CONTEMPT OF COURT. — It is contempt of court to refuse to obey any order of the court which it has jurisdiction to make, irrespective of whether such order is erroneous.
2. —— Every court of record has the power to punish, by fine and imprisonment, wilful disobedience of any process issued or order made by it.
3. —— MANDAMUS. — A final order of court refusing to punish a person guilty of wilful disobedience of its orders, can not be revised under a writ of *mandamus*.
4. —— APPEALS. — In a remedial proceeding for contempt, an appeal will lie from a final order by which the court ends the proceeding and exhausts its jurisdiction.
5. MANDAMUS. — *Mandamus* will not be awarded where there is an adequate remedy, by appeal or otherwise, open to the complaining party.
6. —— *Mandamus* will not lie to compel the circuit judge to issue its process commanding third persons to obey the decree of the circuit court, where the court has made a final order refusing such relief.

APPLICATION for a writ of *mandamus*.

Judgment for the respondent.

DYER, LEE & ELLIS, and KRUM & JONAS, for the relator.

WILBUR F. BOYLE, for the respondent.

THOMPSON, J., delivered the opinion of the court.

This is an application for a writ of *mandamus* to compel the respondent, who is a judge of the circuit court of the city St. Louis, to compel the officers of a corporation to perform a decree previously rendered by the said court, requiring them to transfer on the books of the corporation certain shares of stock to the relator and to issue to him a certificate therefor. The question for decision arises upon a demurrer to the petition. The petition recites the making of the decree, the service of a copy of it upon Edward P. Barrett, president, and William C. Jones, secretary of the corporation, their refusal to obey the same, the issuing by the

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court of an order requiring them to show cause on a day named why they should not be punished for contempt in disobeying the same, and the service of such order upon the said Barrett and Jones. It then recites that Barrett and Jones made a return to this order which was "frivolous and insufficient in point of law, and untrue in point of fact." It then proceeds to set forth wherein the return of Jones, and also wherein that of Barrett was frivolous in point of law and untrue in point of fact, and it then concludes with this averment: "Said relator herein further avers, that the said defendant herein, when he came to discharge said rule for contempt as aforesaid, assigned as the ground for his ruling that the corporation had not kept proper books, and that for that reason he did not see how he could interfere; but that, notwithstanding the said insufficiency of the said return to said order, and notwithstanding the return of the said Barrett and Jones did not show any just or proper cause why they should not be compelled to execute the said decree of said court, yet the said defendant did wilfully refuse to compel the said officers of said corporation to obey and comply with the said decree, and has hitherto refused and now refuses to cause the said decree to be executed and properly enforced in conformity with and in furtherance of the lawful rights of the said plaintiff. Wherefore said plaintiff, relator herein, states that he is without other remedy in the premises, and respectfully prays that a writ of *mandamus* be issued from this court to the defendant, judge of said circuit court as aforesaid, commanding him to compel the said parties, officers of said corporation as aforesaid, to comply with and obey said decree or show cause why the enforcement of said decree should not be required at his hands."

If the circuit court had jurisdiction to render the decree set out in the petition, it was a contempt of court for the officer of the corporation to disobey it, no matter how improvident or erroneous the making of it may have been.

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Partington v. *Booth*, 3 Meriv. 149, per Lord Eldon, C.; *Sullivan* v. *Judah*, 4 Paige, 442; *Stempson* v. *Putnam*, 41 Vt. 238; *Moat* v. *Nolbein*, 2 Edw. (N. Y.) Ch. 188; *The People* v. *Bergen*, 53 N. Y. 404, 410. Compare *Franklin* v. *Smith*, 49 Ga. 112; *Penn* v. *Brewer*, 12 Gill & J. (Md.) 113. But if the court had no jurisdiction to render the decree, no contempt was committed in disobeying it. *Perry* v. *Mitchell*, 5 Den. (N. Y.) 537; *The State* v. *Harper's Bridge Co.*, 16 W. Va. 364; *Harris* v. *Haines*, 35 Mich. 138. Compare *The People* v. *O'Neill*, 37 Cal. 109; *Swinburn* v. *Smith*, 15 W. Va. 500; *The People* v. *Simonson*, 10 Mich. 335. Every court of record in this state has power to punish as for a criminal contempt wilful disobedience of any process or order lawfully made by it. Rev. Stats., sect. 1055. And "when a judgment requires the performance of any other act than the payment of money, a certified copy of the judgment may be served upon the party against whom it is given and his obedience thereto required. If he neglect or refuse, he may be punished by the court as for a contempt, by fine or imprisonment, or both, and, if necessary, by sequestration of property." Rev. Stats., sect. 3728. The case stated in the petition seems to fall directly within these statutory provisions; and if the court has rendered a decree requiring the officers of a corporation to make a transfer of stock, and they refuse to obey it, it is unquestionably the duty of the court, having regard to the rights of the plaintiff, to the respect due to the administration of justice and to its own dignity, to proceed to enforce the decree by imprisonment as for a criminal contempt. Such an imprisonment has none of the elements of imprisonment for debt.

But while, assuming, as we must for the purpose of our present decision, the facts stated in the petition to be true, the conclusion of the court in the proceeding as for a contempt would seem to have been clearly erroneous, it does not follow that we can revise and correct that decision by

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mandamus. If the respondent had, on seeing the return of the respondents in the contempt proceeding, merely refused to proceed further, we could, and would, by our writ of *mandamus*, compel him to proceed; but upon well settled grounds we could not direct him how to proceed, nor command him what judgment to render. But it sufficiently appears from this petition that he did proceed, and that he rendered a judgment discharging the respondents in the contempt proceeding. What we are now asked to do is therefore nothing less than to reverse this judgment by our of writ *mandamus* and to command the respondent to render a different judgment. This would make the writ of *mandamus* a mere substitute for an appeal or writ of error.

An order imposing a sentence of fine or imprisonment upon a person for a contempt of court is in the nature of a *judgment* convicting him of a criminal offence; and when he is imprisoned upon such an order, he is said to be imprisoned *in execution*. De Gray, C. J., in *Crosby's Case*, 3 Wilson, 188; *Ex parte Kearney*, 7 Wheat. 345. See also *Ex parte Goodin*, 67 Mo. 637. Such an order, in order to be valid, can only be pronounced where the alleged contempt took place out of court, at the end of a proceeding which, though summary in its nature, embraces those essentials of a judicial proceeding which are designated by the term, "due process of law." There must be an affidavit or the return of an officer, sufficient in substance, informing the court that a contempt has been committed, and stating the facts upon which such conclusion is predicated. *Re Judson*, 3 Blatchf. (U. S.) 148; *Murdock's Case*, 2 Bland Ch. (Md.) 461, 486; *Ward* v. *Arenson*, 10 Bosw. (N. Y.) 589; *Rugg* v. *Spencer*, 59 Barb. (N. Y.) 383, 397; *Whittem* v. *The State*, 36 Ind. 196, 217; *Wilson* v. *The Territory*, 1 Wyom. T. 155; *Matter of Davis*, 81 N. C. 72; *The State* v. *Blackwell*, 10 S. C. 35; *Batchelder* v. *Moore*, 42 Cal. 412, 415; *Young* v. *Cannon*, 2 Utah T. 560, 594; *Phillips* v. *Welch*, 13 Nev. 158, 165. The accused is entitled to notice and to

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an opportunity to be heard in his defence. *The State* v. *Matthews*, 37 N. H. 450, 454; *The People* v. *Turner*, 1 Cal. 152; *Sommersett* v. *Zellers*, 2 Halst. (N. J.) 31; *Ex parte Langdon*, 25 Vt. 680; *Worcester* v. *Truman*, 1 McLean (U. S.), 483; *Ex parte Ireland*, 38 Texas, 344. And a judgment of conviction without according to him this right is absolutely void. *The State* v. *Judges*, 32 La. An. 1256. The court proceeds after notice and upon inquiry; it hears before it condemns; it renders its judgment upon deliberation. While dispensing with formality of pleading, the ordinary rules of evidence applicable in criminal proceedings apply. *The State* v. *Gilpin*, 2 Del. Ch. 25; *Bates' Case*, 55 N. H. 325. Where, as in this case, the proceeding is instituted by a party to enforce a civil remedy, it assumes the essential characteristics of an adversary proceeding, and the court does not, as a general rule, confine its inquiry to the answers of the respondent to interrogatories, but it hears evidence produced by both parties. *Underwood's Case*, 2 Humph. (Tenn.) 46, 49; *Childrens* v. *Saxby*, 1 Vern. 207; *Magennis* v. *Parkhurst*, 4 N. J. Eq. (3 Gr.) 433; *Emery* v. *Bowen*, 5 L. J. Ch. (N. S.) 349; *The State* v. *Harper's Ferry Bridge Co.*, 16 W. Va. 864, 873; *Rutherford* v. *Metcalf*, 5 Hayw. (Tenn.) 58, 61; *The State* v. *Mathews*, 37 N. H. 450, 455; *Smith* v. *Smith*, 14 Abb. (N. Y.) Pr. 130, 468; *Crow* v. *The State*, 24 Texas, 12, 14; *Henry* v. *Ellis*, 49 Iowa, 205. The decision of the court, by whatever name it be called, and whether it be in favor of or against the accused, possesses the essential characteristics of a final judgment dispositive of a substantial right. This being so, whilst it is a rule of common-law procedure that an appeal does not lie from a judgment in a proceeding for a criminal contempt, yet it is generally held that where the proceeding is, as in this case, a remedial proceeding as for a contempt, the final judgment or order by which the court ends the proceeding and exhausts its jurisdiction is subject to revision by appeal.

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Romeyn v. *Caplis*, 17 Mich. 449; *McCredie* v. *Senior*, 4 Paige, 378; *Spaulding* v. *The People*, 10 *Id.* 264; *s. c.* on appeal, 7 Hill, 302, and 4 How. Pr. 21; *The People* v. *Sturtevant*, 9 N. Y. 209; *Ballston Spa Bank* v. *Marine Bank*, 18 Wis. 490; *Shannon* v. *The State*, 18 Wis. 604; *The People* v. *Hooley*, 48 Barb. 564; *Forbes* v. *Willard*, 67 How. Pr. 193; *Ludlow* v. *Knox*, 7 Abb. Pr. (N. S.) 411 (in New York Court of App. 1869); *Brinkley* v. *Brinkley*, 47 N. Y. 40; *Haines* v. *Haines*, 35 Mich. 138; *Matter of Davis*, 81 N. C. 72; *Re Pierce*, 44 Wis. 411, 432; *Matrons* v. *Kearney*, 79 N. Y. 496; *Witter* v. *Lyon*, 34 Wis. 564; *Hundhausen* v. *Insurance Co.*, 5 Heisk. (Tenn.) 702. There can be no question that an appeal lies from such a judgment or order in this state. Under our statute "every person aggrieved by any final judgment or decision of any circuit court in any civil cause, or by any such judgment or decision of the St. Louis Court of Appeals, from which an appeal is not prohibited by the constitution, may make his appeal to the court having appellate jurisdiction of such judgment or decision." Rev. Stats., sect. 3710. Clearly, such an order is a "final judgment or decision" "in a civil cause;" and whether it be the subject of appeal can not be determined by the question whether it was rendered in favor of the one party to the controversy or the other. If it be a judgment convicting the defendant of the contempt charged and imposing upon him a punishment therefor, it is a final judgment by which he may be aggrieved, and which may be the subject of an appeal by him. If, as in this case, it be a judgment discharging the accused from prosecution, it finally disposes of the right demanded by the other party to the civil proceeding, and it is a judgment by which he may be aggrieved within the meaning of the statute. It is the constant practice in this state to grant appeals from orders made upon motions in civil proceedings. *Wise* v. *Darby*, 9 Mo. 131; *Slagel* v. *Murdock*, 65 Mo. 522. And it is held that such an appeal

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lies whenever an order overruling a motion is a complete disposition of the subject-matter of the motion. *Gale* v. *Michie*, 47 Mo. 326; *Straat* v. *Rinkel*, *ante*, p. 115.

Nor is there in this case any technical difficulty in the way of granting an appeal to the prosecutor in the proceeding as for contempt, on the ground that he is not a party to the record; for, although in these proceedings, according to the usual practice, the proceeding is entitled in the name of the state against the accused person after an attachment has issued (*Matter of Bronson* v. 12 Johns. (N. Y.) 459; *Folger* v. *Hoagland*, 5 Johns. (N. Y.) 235; *The People* v. *Farris*, 9 Johns. (N. Y.) 160; *The United States* v. *Wayne*, — Wall. (U. S.) 134; *The First Congregational Church* v. *Muscatine*, 2 Iowa, 69, per Isbel, J.; compare *DuBois* v. *Phillips*, 5 Johns. (N. Y.) 235; *Baltimore, etc., Railroad Co.* v. *Willing*, 13 Gratt. (Va.) 57; *Wood* v. *Webb*, 3 T. R. 253; *Rex* v. *The Sheriff of Middlesex*, 3 T. R. 133; *Wenslow* v. *Mayson*, 113 Mass. 411, 430; *McDermott* v. *Clary*, 107 Mass. 501, 504); yet this practice is by no means universal; there is good authority for the rule that the proceedings should be entitled throughout in the name of the parties to the civil action. *Stafford* v. *Brown*, 4 Paige, 360; *The People* v. *Craft*, 7 Paige, 325; *Haight* v. *Lucia*, 36 Wis. 355. But if there were an inflexible rule requiring the proceeding to be entitled in the name of the state after the attachment had issued, this rule would interpose no obstacle in the way of the right of the plaintiff to an appeal in a case like the present, where the final judgment which denies to the plaintiff the remedy which he seeks is given before the issuing of an attachment; and for the further reason that our statute, above quoted, prescribing who may appeal, gives the right of appeal to any person aggrieved by the judgment, and does not limit the right to those who are parties on the face of the record.

The writ of *mandamus* is never awarded where any other and adequate remedy is open to the party complaining. It

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is never awarded where such party has a remedy by appeal or writ of error. We can not by this means summon a judge of the circuit court to the bar of this court to answer why he rendered a certain judgment, merely because it is alleged to have been rendered upon a showing which was frivolous in point of law and untrue in point of fact. The mere fact that we may regard his judgment as erroneous does not give us jurisdiction to proceed to correct it in this way. It is no argument that the remedy by appeal is not as speedy as the remedy by *mandamus*. For if this argument were allowed to prevail the writ of *mandamus* would soon become a substitute for an appeal. Our docket, instead of being made up chiefly by appeals and writs of error, would be crowded by petitions for *mandamus*, and the proceeding by appeal would in turn become the more speedy remedy. Instead of proceeding in an orderly way to revise the judgments of the circuit courts upon the full records of their proceedings, certified to us in bills of exceptions, we should in every case put the circuit judge upon trial, and put upon him the onerous burden of employing counsel to defend at our bar his judicial action. Under such a system the office of circuit judge would become intolerable; but what would be still more incongruous and absurd, we should proceed to correct his errors without his record before us, and with only one of the parties to the proceeding before us.

In this case we are asked to go to the length of commanding a judge of the circuit court to arrest and imprison two persons who are not even parties to the proceeding before us, thus entirely ignoring the rule that a party must be heard before he is condemned. If we were to do this, the order of commitment of the circuit judge, though made under the compulsion of our writ of *mandamus*, would be merely void, and no court would hesitate to discharge the prisoners on *habeas corpus*.

We have thus made our views clear; but it is proper, be-

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fore closing, to notice some decisions of other courts upon this question, to which our attention has been invited.

In *Ex parte Chamberlain* (4 Cow. 49), a *mandamus* was asked for in the supreme court of New York to compel the justices of the general sessions of the peace to attach and punish a certain person for non-attendance in that court as a witness. The court refused the application, on the ground that the person was not bound to attend as a witness without the tender of his fee for such attendance, and is reported to have said: "They should have denied this motion at once, on the ground that it sought for a *mandamus* to compel an inferior court to punish for a contempt, had the matter rested there; for every court must be the sole judge whether a contempt has been committed against it or not; but as the private rights of an individual were also implicated, they had for that reason looked into the merits." It is perceived that this case is no authority for the contention of the relator; because the *mandamus* was asked to compel the issuing of an attachment, which is merely an initiatory step in a proceeding for a contempt, and is not an adjudication. *Ex parte Mason*, *ante*, p. 41.

In *Ortman* v. *Dixon* (9 Cal. 23), a decree had been rendered in a chancery suit enjoining the defendants from doing a certain act. Pending a motion for a new trial, they had violated the injunction, and the plaintiffs had applied for an attachment against them for a contempt of court, which was refused, upon the ground that the pendency of the motion operated as a suspension of the injunction. The supreme court held that this view was erroneous, and awarded a peremptory *mandamus*. It appears that this case resembles the preceding one, in that the *mandamus* was asked for to compel the court to issue the initial process in a contempt proceeding, not to direct the court what judgment to render upon the return of such process, much less to reverse a judgment already so rendered.

In the case of *Kimball* v. *Morris* (2 Metc. (Mass.) 573),

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it was held that a *mandamus* might issue to compel a judge of probate to arrest and imprison an insolvent debtor, upon its being proved or admitted that the facts required by the statute to be shown to such judge, upon which he was required to order such an arrest and imprisonment, were made to appear to him ; but not if such facts were not made to appear. This is the strongest case which has been cited for the relator. The question whether any other remedy was open to the creditor was not considered, but it seems to have been taken for granted that there was not.

On the other hand, in *The People* v. *Turner* (1 Cal. 152), a *mandamus* was applied for to vacate an order which had been made punishing the relator for a contempt; and it was held that the *mandamus* would not lie, because the error, if any, could be reached and corrected by *certiorari*. A *mandamus*, the court ruled, would not in any event be the proper remedy, because it merely sought to reverse a judgment of an inferior court. This case is entirely in point in the case at bar, the only distinction being that there the court adjudged the party to be in contempt, and here the court has adjudged the party not to be in contempt. This, however, is a distinction without a difference — the principle being that the court in each case has rendered a judgment, and that a *mandamus* is not a proper writ to bring up and reverse a judgment of an inferior court.

In *Ex parte Briggs* (64 N. C. 202), a *mandamus* was asked for to restore an attorney who had been disbarred for an alleged contempt of a district court. This remedy was refused on the ground that a *certiorari* in the nature of a writ of error lay, under the practice in that state, to bring up the whole proceeding for review. And the cases of *Ex parte Bradley* (7 Wall. 376) and *The People* v. *Justices* (1 Johns. Cas. 181), where a contrary conclusion was reached, were distinguished, on the ground that under the system of procedure in vogue in those jurisdictions, there was no other remedy. There can be no question that the North Carolina

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case was decided rightly on this point, and that our courts would so decide under our system; because here, if an attorney is tried and disbarred, an appeal will lie. *In re Bowman*, 7 Mo. App. 569.

We have been referred to the case of *The People* v. *Oelbricks* (5 Wend. 114); but that case is not in point, because there the *mandamus* was asked for to vacate an order granting a new trial. It is unnecessary to say whether or not the principles there laid down meet with our approval.

Because the purpose of this proceeding is to control the judicial discretion of a judge of an inferior court, to compel him to set aside a judgment which he has rendered and to render a different judgment; and because the relator, if aggrieved by the judgment which he has rendered, has an adequate remedy by appeal, we hold that the demurrer must be sustained and judgment entered for the respondent. It is so ordered. All the judges concur.

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CASES DETERMINED

IN THE

ST. LOUIS COURT OF APPEALS,

OCTOBER TERM, 1884.

Charles Daudt, Appellant, v. James Harmon et al., Respondents.

October 28, 1884.

1. **Homestead — Administrator's Sale.** — Homestead rights can be divested by an administrator's sale under order of the probate court only where the sale is made to pay debts contracted prior to the recording of the deed of the homestead realty. 16 203 105m 61 16 203 125m 499
2. **—— Ejectment — Burden of Proof.** — In an action of ejectment by the purchaser under such a sale, the burden is on him to show that the debt for the payment of which the sale was made was antecedent to the homestead.
3. **—— Evidence.** — The record of the probate court is the only proper evidence of the fact, and unless it shows that the order of sale was made for an antecedent debt homestead rights of minors are not affected by the sale.

Appeal from the St. Charles Circuit Court, Edwards, J. *Affirmed.*

C. Daudt, *pro se:* A claim of homestead exemption will not avail against the debts created prior to the acquisition of the land sued for. — *Farra* v. *Quigly*, 57 Mo. 289; *Stivers* v. *Horne*, 62 Mo. 473; *Schindler* v. *Givens*, 63 Mo. 395; *Lincoln* v. *Rowe*, 64 Mo. 138; *The State ex rel.* v. *Diveling*, 66 Mo. 375; *Stanley* v. *Baker*, 75 Mo. 60. To make a sale of the homestead by an administrator valid, it must appear that the debt for the payment of which it

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was sold was contracted before the homstead right attached or was acquired. — *Rogers* v. *Marsh*, 73 Mo. 64; *Kelsay* v. *Frazier*, 78 Mo. 111.

LACKLAND & WILSON, for the respondents: The sale by the administrator under the order of the probate court did not carry the homestead interest. The probate court has no power or authority in law to order a sale of the homestead for the payment of a pre-existing debt. It is an inferior court of statutory creation and limited, in its jurisdiction and authority, to the exercise of those powers only which are expressly conferred upon it by statute. — *Presbyterian Church* v. *McElhiney*, 61 Mo. 543; *Jefferson County* v. *Cowan*, 54 Mo. 234, 237; *Schell* v. *Leland* 45 Mo. 294. Before the homestead rights can be denied, it must be shown that the sale was made for the payment of a pre-existing debt. — *Rogers* v. *Marsh*, 73 Mo. 64, 69, 70; *Howe* v. *McGivern*, 25 Wis. 531, 532; *Kelsay* v. *Frazier*, 78 Mo. 113, 114. And the burden is upon the plaintiff to prove that it was sold for the payment of such a debt. — *Rogers* v. *Marsh*, 73 Mo. 69, 70; *Kelsay* v. *Frazier*, 78 Mo. 113, 114. It is not sufficient to show that one claim allowed against the estate was in fact a pre-existing debt. The records of the probate court must show that fact, and also that the homestead was ordered sold, and was sold for the payment of the pre-existing debt. — *Howe* v. *McGivern*, 25 Wis. 525, 531, 532; *Schell* v. *Leland*, 45 Mo. 290, 294.

BAKEWELL, J., delivered the opinion of the court.

This was ejectment for thirty-three acres of land in St Charles County. The answer is a general denial, and sets up that the original defendant was a tenant of Charles E. Keene, deceased; that defendants, George and Samuel Keene, are minors aged fourteen and sixteen years respectively, the only sons and heirs of said Charles E Keene; that they defend by their general guardian, Eli Keene;

that the premises were the homestead of their father at the time of his death, and worth less than $1,500; that Charles E. Keene is dead; and that the homestead at his death, vested in the minor defendants.

It appears from the evidence and admissions, that the facts set up in the answer are true; that Charles E. Keene died in 1881; that the public administrator of St. Charles County took charge of his estate. The assets of the estate, exclusive of the realty in question, were $543.50, and the claims allowed against it amounted to $2,883.45; of these two were judgments in favor of Overall's estate, rendered against deceased in his lifetime, one for $325.35, and the other for $922.20, which were placed in the fourth class. There were five other allowed demands amounting to $1,635.90. The administrator obtained an order of sale of the realty to satisfy allowed demands. Under the order of sale, the premises in question were appraised at $30 an acre, or $990, free from the homestead rights of the minor heirs, and at $15 an acre, or $495, subject to the homestead right. The plaintiff Daudt was one of the appraisers. Under these proceedings the land in question was sold, and purchased by Mr. Daudt at public sale for $400. The administrator executed a deed to Daudt, under which he claims. The report of sale having been approved, Charles E. Keene moved on to the premises in 1870 or 1871, and occupied them as homestead at the time of his death in 1881. His wife died on the premises a year or two before her husband's death. There are on the premises a dwelling house and orchard, erected and planted by Charles E. Keene about 1871. The premises are not worth over $1,500, and are thirty-three acres in extent.

Against defendant's objection, plaintiff introduced a deed from Cabell and wife to Charles E. Keene for the premises in question, dated and recorded in November, 1867, and evidence tending to show that Cabell claimed the land at the date of the deed, and was in possession when he sold

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to Keene. Plaintiff, also against objections, offered evidence tending to show that the allowance of the demand in favor of Overall's estate against Keene's estate was made on December 22, 1881, for $325.35 and placed in the fourth class, and that it was upon a judgment of the circuit court rendered September 13, 1875, against John N. and C. E. Keene for $216.93, rendered upon a note dated October 23, 1866, for $130, made by John N. Keene in favor of Charles E. Keene, at six months, and indorsed by the latter.

Plaintiff offered to prove by the administrator that Keene's estate is insolvent; that the purchase-money, $400, paid by Daudt, are the only assets out of which funeral expenses and expenses of administration must be paid, and that there are only two fourth class demands, as already set forth.

Defendants offered to prove by the administrator of Keene's estate, and by defendant Eli, that they were present at the sale and that it was then and there distinctly understood by the bidders and all concerned, that the property was sold subject to the homestead rights of the minor defendants; that, if this had not been understood, the property would have brought a much better price, and that defendants had no notice that it was the intention to sell the homestead for an antecedent debt. This was excluded by the court.

It was admitted that the judgment on the note in evidence was the only claim allowed against the estate that was contracted before the recording of the deed to Keene for the premises in controversy. The court gave and refused instructions which it is not necessary to set out; and of its own motion, gave a declaration of law to the effect that the verdict and judgment must be for the defendants, unless it appears from the record of the probate court that the land in question was sold to pay a debt that accrued before the homestead was acquired; and that the order,

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sale, and deed could only convey the right, title and interest of Keene, deceased, subject to the homestead rights of his minor children, unless the record of the probate court showed that the sale was for a privileged debt.

The cause was tried without a jury, and the finding and judgment were for defendants.

The statute provides (Rev. Stats., sect. 2693) that "if any housekeeper or head of a family shall die, leaving a widow or any minor children, his homestead, to the value aforesaid, shall pass to and vest in such widow and children, and shall continue for their benefit without being subject to the payment of the debts of the deceased, unless legally charged thereon in his lifetime, until the youngest child shall attain its legal majority, and until the death of such widow, and such homestead shall, upon the death of such housekeeper or head of a family, be limited to that period. But all the right, title, and interest of the deceased housekeeper or head of a family in the premises, except the estate of the homestead thus continued, shall be subject to the laws relating to devise, descent, dower, partition, and sale for the payment of debts against the estate of deceased; and the probate court having jurisdiction of the estate of the deceased housekeeper or head of a family, shall, when necessary, appoint three commissioners to set out such homestead to the person or persons entitled thereto."

And (sect. 2695): "Such homestead shall be subject to attachment and levies of execution upon all causes of action existing at the time of the acquiring such homestead, except as herein otherwise provided; and for such purpose, such time shall be the date of the filing in the proper office of the recorder of deeds the deed of such homestead, and in case of existing estates, such homestead shall not be liable to attachment or levy of execution upon any liability hereafter created."

These are the only statutory provisions authorizing the

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sale of the homestead for the debts of the head of the family.

It is accordingly held that a claim of homestead exemption will not avail against debts created prior to the acquisition of the land sued for. *Farra* v. *Quigly*, 57 Mo. 284; 62 Mo. 473; 63 Mo. 394; 64 Mo. 138; 66 Mo. 376. It is, however, held that the homestead rights may be divested by administrator's sale, but only in the case where the sale is made to pay debts existing before the filing of the deed under which homestead is claimed; and that the burden of showing that the sale was to pay antecedent debts rests upon the party claiming under the administrator's deed; and unless this is shown, the homestead rights are not affected by the administrator's sale. *Rogers* v. *Marsh*, 73 Mo. 64, 69; *Kelsay* v. *Frazier*, 78 Mo. 111. How this is to be shown has not been expressly decided. The question not having been presented, is, so far as we know, entirely new in this state.

It seems clear, however, that, in order to sustain an administrator's sale, by order of court, of homestead property, it can not be enough to show after the sale, and in the action of ejectment founded on the administrator's deed, that one of the debts in the list filed on application for the order of sale was in fact contracted before the homestead was acquired. Any such rule would open the door to the grossest abuse. The present case is an instance of this. The purchaser bought the realty at something less than the value of the lands subject to homestead, as fixed by himself as one of the appraisers. It does not appear that any one concerned knew, or suspected, that any of the claims against the estate originated in a demand that accrued before the homestead was acquired. Defendant offered to show that the understanding at the sale was that the land was sold subject to homestead. This must have been the understanding, since the homestead rights could not be sold except for an antecedent debt, and there was nothing in the papers of the estate, or the records of the probate court, to

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show that any of the claims were for demands that accrued before the homestead was acquired. The purchaser, perhaps, did not discover the fact that there was an antecedent debt amongst the claims until after the purchase. If, before the purchase, he looked at the proceedings in the original judgment in the circuit court and discovered that it was upon a note that matured before the homestead was acquired, he concealed the fact, if, as defendants offered to show, it was understood at the sale that no homestead rights were to be affected by the sale. The question of what passes by an administrator's deed can not be allowed to depend upon what may be discovered after the sale to have been the original date of the contracting of one of the debts proved against the estate and set forth in the list attached to the application for an order of sale.

The probate court has no authority to order a homestead to be sold except for antecedent debts, and before such property is sold for antecedent debts there ought to be a finding of that court that the debt for which the property is sold was contracted before the homestead was acquired, and this should appear in the order of sale, in order that those interested in the estate, as well as the purchasers, may know what is being offered for sale. This is held by the supreme court of Wisconsin in *Howe* v. *McGivern* (25 Wis. 525); and unless this is held, a door is opened to fraud. The widow and minors ought not to be deprived of their homestead without any opportunity of protecting it, or any notice that it is offered for sale.

We are, therefore, of opinion that the circuit court properly held that, in order to maintain his action in this case, it was necessary for the purchaser to show from the record of the probate court that the order of sale was an order to sell the homestead for a debt that accrued before the homestead was acquired.

The judgment is affirmed. All the judges concur.

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CITY OF ST. LOUIS, Appellant, v. A. SPIEGEL, Respondent.

October 28, 1884.

1. CITY CHARTER — ORDINANCES — MEAT SHOPS — CONSTITUTIONAL LAW. — The city of St. Louis has the power, under its charter, to tax meat-shops.
2. —— The sale of meat in meat-shops, and the sale of meat in market-houses are not, within the meaning of section 8 of article 10 of the city charter, the same class of subjects.
3. —— An ordinance which provides that "the owners of meat-shops who have paid their license may be permitted to deliver meat in a wagon or otherwise, without taking out an additional license therefor, and in the new limits such owners may send out their wagons in such new limits," does not thereby limit the sale of meat, in the new limits, from wagons, to those whose meat-shops are within the new limits.

APPEAL from the St. Louis Court of Criminal Correction. NOONAN, J.

Reversed and remanded.

LEVERETT BELL and ASHLEY C. CLOVER, for the appellant.

J. C. McGINNIS, for the respondent: Wherever license fees are imposed for the main purpose of revenue they are in effect taxes. — Cooley Const. Lim., pars. 281, 495; *Ward* v. *Maryland*, 12 Wall. 418; *The State* v. *Hoboken*, 23 N. Y. L. 1869; Dill. on Mun. Corp., pars. 291, 295, 609; *Glasgow* v. *Rowse*, 43 Mo. 479; *The City of St. Louis* v. *Spiegel*, 75 Mo. 145. The city of St. Louis can exercise only such powers as are expressly conferred in its charter, or such as by necessary implication grow out of the powers directly conferred. — *Savannah* v. *Hartridge*, 8 Ga. 23–26; *Mays* v. *Cincinnati*, 1 McCook (O.), 273; Burr. on Tax., sect. 128; *The City of St. Louis* v. *Boatmen's Insurance and Trust Co.*, 47 Mo. 153; *The City of St. Louis* v. *Green*, 7 Mo. App. 468, and 70 Mo. 562.

BAKEWELL, J., delivered the opinion of the court.

This was an action begun in the police court of the city of St. Louis, against respondent, for violation of ordinance

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No. 12,508 in this, that he kept a meat-shop within said city, at 725 Chouteau Avenue, on October 8, 1883, and other days, without a license.

On trial anew in the court of criminal correction, it was shown that defendant was, at the date named, keeping a meat-shop and selling meat, at the place named, within the old city limits.

Plaintiff, against defendant's objection introduced in evidence ordinance 12,508, and also 11,668, which was before this court for consideration in *City* v. *Spiegel* (8 Mo. App. 478).

The ground of defendant's objection to ordinance 12,508 was, that it was *ultra vires* of the city, and in violation of section 3, article X, of the constitution of the state, because not uniform, and that it is unreasonable and partial. The jurisdiction of the police court, in such matters, was shown.

Defendant, against plaintiff's objection, showed that the actual expense of issuing a license is one dollar; that butchers in the public markets are not required to pay a license; and that the privilege of peddling meat from wagons in the new city limits is worth about seven hundred dollars a year.

The court then found defendant not guilty and rendered judgment accordingly.

Ordinance 11,668 established a license tax upon meat-shops of $100 in the old limits and $25 in the new limits; we held, in the case above cited, that this might be done. But in this, it seems, we were wrong; for on appeal (*City* v. *Spiegel*, 75 Mo. 145), the supreme court held that this was an unconstitutional discrimination between the amounts of taxation imposed upon the same class of subjects.

The ordinance 12,508 which defendant is charged with violating, amends the objectionable feature of the original ordinance by fixing the license tax on meat-shops throughout the city at fifty dollars per annum for each shop.

1. It is now contended by appellant that the city can not tax meat shops. We held, however, in the case cited

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above, that this could be done; and our decision as to this is not in any way shaken by the ruling of the supreme court in *City* v. *Spiegel*, or by anything said in that opinion. It is not necessary to add anything to what is said by this court in *City* v. *Spiegel* (8 Mo. App. 478.) As to the doctrine of *ejusdem generis*, however, we may refer to our more recent opinion in *City* v. *Herthel* (14 Mo. App. 467). These two cases dispose, so far as this court is concerned, of the objection that no power to tax meat-shops is given under the existing city charter.

2. The first section of the ordinance under consideration (Ord., No. 12,508) provides "that the owners of meat-shops, who have paid their license, may be permitted to deliver meat in a wagon, or otherwise, without taking out an additional license therefor, and in the new limits added to the city by such charter, such owners of meat-shops may send out their wagons to sell meats in such new limits."

It is contended that, by this language, a valuable privilege of hawking meat is given to the keepers of meat-shops within the new limits, which is denied to those paying the same license within the old limits of the city. We do not see that the language, by any fair construction, limits the right to sell meats in the new limits from wagons to those where meat-shops are within the new limits. It is therefore unnecessary to consider whether this could be done.

3. It is claimed that the ordinance is unconstitutional, because it does not apply to the retailers of meat in the city markets. But we do not consider that the sale of meat in market-houses and the sale of meat in meat-houses are "the same class of subjects," within the meaning of the constitutional inhibition. Art. X., sect. 3. The supreme court, in *City* v. *Weber* (44 Mo. 547), held an ordinance just and reasonable which prohibited meat-shop men, as distinguished from lessees of market stalls, from selling fresh meat in less quantities than a quarter and from selling meat

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at all in the new limits. This would hardly have been done had the meat-shop men and market men been of the same class. They are *ejusdem generis* in that they are both retailers, and retailers of meat; but the selling of meat in meat-shops and the selling of it in a common market-house are evidently different classes of subjects, exposed to different regulations, and which have usually been the subjects of distinct ordinances, owing to the very different conditions of the two trades.

We see no reason to hold the ordinance in question invalid, and therefore think that the judgment should be reversed and the cause remanded. All the judges concur.

STATE OF MISSOURI, Respondent, *v.* JAMES KELLY, Appellant. 16 213 100m 664 16 213 109m 322

October 28, 1884.

1. CRIMINAL LAW — ASSAULT — INTENT — INSTRUCTIONS. — In a prosecution for assault, where there is evidence that the assault was with the fist, and under which the accused might be convicted of a common assault, it is error to neglect to instruct the jury that if they believe there was no intent to kill they may acquit of the felony.
2. —— ALIBI. — In such an action, where there is substantial evidence to support the defence of *alibi*, it is error to neglect to instruct the jury with reference to this defence.

APPEAL from the St. Louis Criminal Court, VAN WAGONER, J.

Reversed and remanded.

MARTIN & FAUNTLEROY, for the appellant.

T. B. HARVEY, for the respondent.

THOMPSON, J., delivered the opinion of the court.

The defendant was indicted under section 1262 of the Revised Statues for an assault with intent to kill, and was

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convicted and sentenced to imprisonment for six months in the county jail.

1. We must reverse this judgment, because the charge of the court did not present the law to the jury in its application to all the hypotheses of fact presented by the evidence. By section 1655 of the Revised Statutes the defendant was entitled, if the jury should believe that the assault was not made with the intent to kill, to be acquitted of the felony, and convicted of a common assault under section 1265. But the court failed to instruct the jury that they were at liberty to do this. There was no evidence that the assault was made with a weapon which was necessarily deadly in its character; and though the prosecuting witness received a very severe blow, they might well have found, had they been instructed that they might, that there was no intent to kill. No instruction of this kind was requested; but it is settled law in this state that the court is bound, in a criminal case, to instruct as to all the degrees of the crime charged of which there is any evidence tending to prove the defendant guilty. *The State* v. *Banks*, 73 Mo. 592; *The State* v. *Branstetter*, 65 Mo. 149.

2. The only defence was an *alibi*, and the testimony of four witnesses tended to make this defence good. With reference to this defence the defendant asked the court to instruct the jury that "if, from the evidence in the case, they have a reasonable doubt whether the defendant was present at the time and place of the commission of the offence charged in the indictment they should find the defendant not guilty." This instruction the court refused to give. This ruling calls up a question which has been once before the supreme court, and twice before this court. In *The State* v. *Lewis* (69 Mo. 92), the only defence, as here, was an *alibi*. The court was asked to give the following instruction: "The jury are instructed, if they have a reasonable doubt that the defendant committed the homicide alleged in the indictment, or was absent at the time said homicide

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was alleged to have been committed, they will find a verdict of acquittal." This instruction the court refused to give, nor did the court in any other instruction call the attention of the jury to the defence of *alibi*, but in the instructions given language was used which had the effect of assuming that the prisoner was present; but the court, as here, gave the usual instruction on the doctrine of reasonable doubt as applicable to the whole case. It was held that it was error to refuse the instruction above set out; the supreme court taking the view that the instructions which were given upon the different degrees of homicide were calculated to mislead the jury, because they assumed that the defence of *alibi* was frivolous and unfounded. We understand the force of this decision to be: 1. That where the only defence is an *alibi* it is a sound proposition of law that the defendant ought to be acquitted if the evidence raises a reasonable doubt in the minds of the jury as to whether the prisoner was present at the doing of the act charged against him as a crime. On this proposition of law we have no doubt. *The State* v. *Herndon*, 46 Iowa, 23; *Howard* v. *The State*, 50 Ind. 190; *Walker* v. *The State*, 42 Texas 260; *The State* v. *Emory*, 12 Mo. App. 593. 2. That it is error for the court to refuse, upon request, so to instruct the jury, where the defence of *alibi* is not otherwise in the instructions brought to their attention. That was the understanding which we had of that decision when we decided the case of *The State* v. *Emory* (*supra*); and the court having in that case directed the minds of the jury to the defence of *alibi*, and given them the proper instruction as to the doctrine of reasonable doubt in its application to the guilt or innocence of the defendant as it stood upon all the evidence, we were unwilling to reverse the judgment because of the failure of the court specially to apply the doctrine of reasonable doubt to this defence, when not requested so to do. In the case of *Walker* v. *The State* (*supra*), it was held error to refuse an instruction such as was here refused where the defence was an *alibi*; but the

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court, in the instructions which were given, had treated the defence as an independent affirmative defence, in the nature of a plea of confession and avoidance, which had to be made out "to the entire satisfaction of the jury." Of course this is not the law. The defence of *alibi* is not such a defence. It is merely a species of evidence tending directly and necessarily to rebut the case made by the state. It is therefore sufficient if the evidence by which it is sought to establish it raises a reasonable doubt in the minds of the jury as to whether the defendant was present at the doing of the act charged. In the case of *The State* v. *Emory* there was no such error. Touching the defence of *alibi* the court merely told the jury: "If the robbery complained of occurred, and at the time it occurred the defendant was not present at the place where it occurred, but was elsewhere, he can not be guilty, and you ought to acquit him." Here was no intimation as to the probative force of the evidence which was necessary to make out the defence of *alibi;* and the court having elsewhere given the proper instruction as to the doctrine of reasonable doubt, with reference to the main issue of the defendant's guilt or innocence, we held that we ought not to reverse the judgment for its failure to give an instruction applying the doctrine of reasonable doubt specially to that defence, it not having been asked to do so. We reaffirmed that decision in *The State* v. *Cunningham* (13 Mo. App. 576), and we are still satisfied with it.

But in the present case the court called the attention of the jury to the defence of *alibi* in the following language: "If from the evidence you *believe and find* that this defendant was not present at the time of the alleged assaulting, striking, cutting, and wounding of James M. Gray referred to in the indictment, but that he was elsewhere, at another place, then he can not under such circumstances be guilty as by the indictment he stands charged, and then in such case you should acquit the defendant." This instruction seems to embody the idea that the defence of *alibi* is a

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separate substantive defence, which must be made out to the satisfaction of the jury, and that they must find affirmatively that it is true. We feel constrained to hold that this instruction presented the defence of *alibi* to the jury in such a way as to mislead them with reference to the probative force of the evidence which is sufficient to establish it, and that this error was not cured by the general instruction with reference to the doctrine of reasonable doubt in its application to the whole case. To avoid any misconstruction of our views we will say that we think it safer and better in all cases where the defence is *alibi*, and there is substantial evidence tending to support it, for the court to instruct the jury that if they have a reasonable doubt whether the defendant was present at the time and place of the fact charged, or so near thereto as to have done the same, they ought to acquit him.

For the error of failing to instruct the jury that they might acquit of a common assault, of refusing the defendant's instruction touching the doctrine of reasonable doubt in its application to the defence of *alibi*, and of instructing the jury to the effect that they must believe and find this defence to be true, we reverse the judgment and remand the cause. It is so ordered, with the concurrence of all the judges.

E. P. LINDLEY, EXECUTOR, Appellant, v. T. P. RUSSELL ET AL., Respondents.

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November 11, 1884.

1. **EQUITY — PLEADING — MULTIFARIOUSNESS. — A bill in equity is not multifarious unless distinct and independent matters are united therein.**
2. **—— INJUNCTION. — If an action at law gives an unfair advantage to the adverse party, equity will interfere and grant relief.**
3. **—— The plaintiff being entitled to a cancellation of an instrument of writing, equity will interfere to restrain a proceeding in replevin for its pos-**

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session, where its possession by the defendant would work a fraud on the plaintiff or those for whom he is acting as trustee.

APPEAL from the St. Louis Circuit Court, LINDLEY, J.

Reversed and remanded.

JAMES J. LINDLEY and HENRY W. BOND, for the appellant: Injunction will issue whenever a suit at law affords "an unfair advantage" to adverse party.—57 Mo. 422; 51 Mo. 100.

CHARLES F. JOY and JOHN A. LEWIS for the respondents: The bill is multifarious.—*Mole* v. *Smith*, Jac. Rep. 490–494; *Bobb* v. *Bobb*, 8 Mo. App. 257; *Stallcup* v. *Garner*, 26 Mo. 72; *Robinson* v. *Rice*, 20 Mo. 229; *Maybury v. McClurg*, 51 Mo. 256; *Clark* v. *Cov. Mut. L. Ins. Co.*, 52 Mo. 272. The petition is also bad for the reason that two causes of action are not separately stated.—*Doan* v. *Holly*, 25 Mo. 357. "No relief will be granted in equity where the complainant has a complete and adequate remedy at law."—*Janney* v. *Spedden*, 38 Mo. 395; *Arnold v. Clepper* 24 Mo. 273; *Camp* v. *Matheson*, 30 Ga. 170; Harkins' Appeal, 78 Pa. St. 196; *Whittelsey* v. *Hartford*, 23 Conn. 421.

BAKEWELL, J., delivered the opinion of the court.

The petition alleges the following facts: Mary A. Russel died on the 12th of October, 1883. By her last will, which was duly probated on the 13th of October, 1883, she named plaintiff as her executor. Letters testamentary were issued to plaintiff on the 26th of October, 1883. Certified copies of the will and letters are filed as exhibits with the petition. In addition to a small amount of personalty, which will be applied to pay legacies, about which there is no dispute, the rest of the property of the deceased was a farm of two hundred and thirty-six acres in Moniteau County, worth $10,000, and a lot on Grand Avenue, St. Louis, on which is erected a livery stable and other improvements, the whole of this last lot of ground being worth $15,000.

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The will uses the following language as to these two tracts of land: "I devise to my executor Edward P. Lindley, hereinafter appointed, my farm in Moniteau County, Missouri, containing about two hundred and thirty-six acres; to him and his heirs, in trust however for the sole and separate use, benefit, and behoof of my niece Bella Gibson, free and separate from any interest or control of her husband, during her life, and at her death to the heirs of her body living, and if she die without heirs of her body living then to my brother Charles F. Christian, and his heirs absolutely.

"I further devise to my said executor, a certain lot of ground in block 2290 in the city of St. Louis, fronting sixty-three feet two inches on Grand Avenue, by a depth of one hundred and sixty-seven feet, and whereas said lot has cost me about $4,000, and I have also lately executed a mortgage thereon for the sum of $2,000; and whereas my husband has expended money in erecting improvements thereon, I direct my said executor that upon the payment by my husband of a certain mortgage for the sum of $3,000, now resting upon my said farm, and the payment of said mortgage upon said lot, at or before the time said mortgage shall become due and payable, then my said trustee and executor shall convey by deed said lot to my said husband, or to whom he may direct, but in case my husband shall fail or refuse to pay off said mortgages, or to pay the amount sufficient to release the same to my executor at or before the same shall become due; then my executor shall proceed to sell said lot as soon as he may see fit, and shall take from the proceeds thereof the sum of $4,000; also sufficient to pay off said $2,000 mortgage in addition to this; and the balance of the proceeds he shall pay to my husband or to whom he may direct. From the proceeds of such sale or payment by my husband, my executor shall pay off and release the mortgage upon my said farm, and the balance, if any, shall pay to my niece Bella

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Gibson; and if my husband fail or refuse to pay the taxes upon said lot, my executor may proceed in the same manner with respect to said lot as he is directed in the case of said mortgages by my husband."

Plaintiff is informed and believes that the mortgage on the Grand Avenue lot is to secure an indebtedness, not of $2,000 as the will recites, but of over $6,000. This intrinsic fact, he says, presents such difficulties of interpretation as to the proper duties of the executor therein, that he is compelled for his own safety and for the protection of the interests of the residuary devisees to seek a construction of said will in the matter of the proper amount required by said will to be paid by defendant T. P. Russell, before said lot shall be conveyed to him, or in case of his default as to such payment, the proper amount to be deducted by plaintiff in selling said lot as he is directed under said will in the event of non-payment by said T. P. Russell of the amount therein charged to him, and for full and specific directions to plaintiff in the discharge of his duties as executor of said will.

In January, 1883, before the execution of the will, the testatrix, in whom the title to the Grand Avenue lot was vested subject to a mortgage of about $2,000 for unpaid purchase-money, was requested by defendant T. P. Russell, her husband, to convey this lot to defendant W. J. Russell, a son of T. P. Russell by a former wife. This request was accompanied by a false representation by T. P. Russell to his wife that, unless she would make such a conveyance, she would lose title to the lot, by its being sold to pay the mortgage aforesaid and liens for unfinished improvements, and was made upon a pretense of raising money to complete these improvements, and that a new loan could thus be effected whereby the title to the lot would be protected, and its ownership saved to Mrs. Russell.

In furtherance of this fraudulent scheme to get the title out of his wife, T. P. Russell took a title investigator or

draughtsman and a notary public out to his home with a blank deed to said lot to his son and a deed from the son over to the father of even date therewith, for one-half of the same lot, and in the presence of said title investigator, plaintiff's testatrix, signed conjointly with her husband and acknowledged the said deed to his son, Wm. J. Russell, and after signing and acknowledging said deeds, and while holding them in her possession undelivered, said testatrix inquired of the draughtsman or notary public whether it would prejudice her title to said property if these deeds were delivered to her husband, T. P. Russell, and should by him be recorded, and upon a reply made by this person that the title to said property might be impaired in such an event, she at once answered: "I will not deliver these deeds — they shall not go out of my possession to any one," and thereupon the arrangement was immediately broken off and ended.

No valuable consideration was paid, or proposed to be paid by T. P. Russell or by W. J. Russell, or either of them, for these deeds, and plaintiff is informed and believes that whatever incumbrance had been placed on the Grand Avenue lot, was at the instance and for the sole use of T. P. Russell.

Testatrix was then suffering from the acute and incurable disease of which she shortly afterwards died, and her husband greatly aggravated her suffering at this period by persecuting and importuning her to give him possession of these deeds. He searched her drawers, trunks, and private papers to find them. Testatrix had, however, placed them with a third person for safe keeping; with this person the deeds remained until brought to plaintiff by Dr. McCandless together with the will in question, shortly after the death of testatrix.

Defendant W. J. Russell knowing these facts, and that the title to the Grand Avenue lot never passed out of the testatrix until the devise to plaintiff coupled with the trust

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under the will, has instituted a replevin suit in his own name against plaintiff, and obtained a delivery order for said deed.

That suit was brought at the instigation of T. P. Russell, with the fraudulent purpose on his part to obtain possession of said deed and place the same on record, and to dispose of the property described in the deed to an innocent purchaser or mortgagee so as to put it out of plaintiff's power to carry out the trust described in the deed.

This replevin suit is brought against plaintiff in his individual capacity, for the fraudulent purpose, as plaintiff is informed and believes, of evading the statutory provision which would render W. J. and T. P. Russell incompetent to testify had the suit been against plaintiff as executor, in which capacity alone has he ever held or possessed the deed.

In that suit W. J. Russell, who is insolvent, gave bond in the sum of $2,000 only; the property to which Russell is fraudulently seeking to obtain title by means of the replevin suit is worth $15,000. If plaintiff is compelled to deliver possession of the deed on the delivery order, which is in the sheriff's hands, the estate devised to him, and the interests of the devisees, will be irreparably damaged. The deeds in question are inoperative except as clouds on the title to the land devised.

The prayer is for a construction of the will, and a definition of the powers, duties, and trusts which it imposes on plaintiff in reference to the questions submitted, and that the conflicting claims and interests of defendants in said will may be fully determined and settled; and for an injunction to restrain said Russell from prosecuting his replevin suit; and that an order be made that the deeds in question be delivered up and cancelled, as a cloud on plaintiff's title, and for general relief.

The defendants are T. P. and W. J. Russell, Charles F. Christian and Bella Gibson. Defendants Thomas P. and

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William J. Russell demurred to this petition on the following grounds:—

1st. It does not state facts to constitute a cause of action against defendants by injunction. 2d. It improperly joins a cause of action against one defendant alone, to have the will construed with a cause of action against his co-defendant alone to enjoin him from prosecuting a suit. 3d. These causes of action do not separately affect all the defendants, but require separate issues and findings in reference to each defendant. 4th. The causes of action are not separately stated. 5th. There is another action, the replevin suit pending between the same parties for the same cause of action. 6th. There is a defect of parties plaintiff in that E. P. Lindley should be joined in his individual capacity.

This demurrer was sustained. Plaintiff declined to plead further and there was final judgment accordingly.

It would seem that the action at law affords an unfair advantage to the adverse party. It is suggested that the defendant in the replevin suit might apply for an additional bond. But this would only enable him to retake the deed (Rev. Stats., sect. 3851), which might meanwhile have been recorded by the Russells. If the facts alleged by plaintiff in his petition are true, he is undoubtedly entitled to a decree for the cancellation of the deed, and this would seem to be very important for the protection of the interests that he represents.

Respondents admit in their brief that "there can be no question but the executor has the right to come into equity to have the will construed, and that all the beneficiaries under the will are necessary parties to the bill." Is the bill then multifarious for joining W. J. Russell, the grantee in the undelivered deed, with the other parties interested under the will in the property described in it. A bill is multifarious where it unites several claims of a distinct and independent nature which ought to be the subjects of distinct suits; thus improperly joining in one bill distinct and independent

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matters and thereby confounding them. This is done when several distinct and independent matters are united against one defendant, or against several defendants in the same bill. The latter is strictly a misjoinder. The statute provides that any person may be a defendant who has or claims an interest in the controversy adverse to plaintiff, or who is a necessary party to a complete settlement of the question involved therein. If there is a misjoinder as to W. J. Russell, it must be because he has no connection whatever with a large portion of the case made by the petition, and therefore ought not to be made liable for the costs that may accrue in deciding that part of the case, or to be troubled with that litigation.

But on the case stated in the bill, it is difficult to see that the equitable proceeding to cancel the deed could be well prosecuted without some adjudication upon the meaning of the will.

The object of the bill is to ascertain, support, and enforce the trust created by the will as to a piece of real estate in which W. J. Russell is said to claim a one-half interest under a deed alleged to be fraudulent, and in which the other parties are interested as beneficiaries under the will. The parties all claim an interest in the same property. It is true they claim under different titles. Persons otherwise unconnected may be joined as defendants where there is a common interest among them all centering in the point in issue in the cause. *Fellows* v. *Fellows*, 4 Cow. 701. All the defendants here are not, as in that case, alleged to be parties to the same scheme of fraud. Nor would this be decisive. But the general issue as to the validity of the deed in question affects all the parties to the suit. The case is not like *Bobb* v. *Bobb* (8 Mo. App. 257), where we held the bill multifarious because the subjects of the bill were distinct pieces of property, acquired by the twenty defendants by different conveyances alleged to be fraudulent, where the grantees had no common interest, and one

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deed might have been found fraudulent and another not. But even in that case, the supreme court reversed the court of appeals, and held, contrary to our ruling, that the bill was not multifarious, on the ground that the *gravamen* of the fraud or wrong in the sales, affected all the defendants. *s. c.* 76 Mo. 419. Here the alleged fraudulent conveyance of the land by an attempt to validate a lifeless conveyance by a fraudulent pretence of a delivery that was never made, and the alleged plot between the Russells to procure a record of the deed during a temporary possession of the paper on which it is written, for the purpose of making title to an innocent purchaser, or of clouding the title of plaintiff as trustee, affects everybody named in the bill as a party, whether plaintiff or trustee, or any of the other parties to plaintiff's bill. W. J. Russell as claiming to be a grantee of Mrs. Russell, and the others as beneficiaries under her will, having, in contingencies that may arise, each of them a greater or less interest in the land or its proceeds.

We think that the bill, though somewhat loosely drawn, states a cause of action, and that it is not bad on the ground of multifariousness or a misjoinder of parties. We therefore reverse the judgment and remand the cause. Judge Thompson concurs. Judge Lewis is absent.

S. Rosenstein, Appellant, v. Missouri Pacific Railway Company, Respondent.

November 11, 1884.

Carriers — Bills of Lading — Contracts. — Seventy thousand pounds of corn in bulk is not a "package" within the meaning of a printed clause in a bill of lading restricting the carrier's liability for the loss of packages.

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Appeal from the St. Louis Circuit Court, Barclay, J. *Reversed and judgment.*

Virgil M. Harris, for the appellant: The word "package,' as used in the bill of lading, is not applicable to corn in bulk. — *McCoy* v. *Transportation Co.*, 42 Md. 499; *Express Co.* v. *Crook*, 44 Ala. 468; *Bascowitz* v. *Express Co.*, 93 Ill. 523.

Bennett Pike, for the respondent: A common carrier may, by contract, limit its common-law liability. — *Read* v. *Railroad Co.*, 60 Mo. 199; *Snyder* v. *Express Co.*, 63 Mo. 376.

Bakewell, J., delivered the opinion of the court.

The petition alleged that defendant was a corporation organized under the laws of the State of Missouri, and that at the time of the several transactions complained of, defendant was a common carrier of goods, chattels, and merchandise from the town of Charleston, in the State of Missouri, to the city of New York, in the State of New York. That on the 15th and 16th days of November, 1882, defendant, as common carrier aforesaid, received from plaintiff, at the town of Charleston, Mo., nineteen hundred and eighty-two bushels of bulk corn, to be carried by defendant to New York, and undertook and agreed with plaintiff to safely transport, and within a reasonable time deliver said corn at the city of New York. That defendant failed and neglected to perform its duty as a common carrier in the transportation of said corn, in this: that said defendant failed and neglected to provide the necessary facilities for transportation, and to use due diligence therein; and that by reason of said failure and neglect, the said corn was greatly and unreasonably delayed in transit, to the great loss and damage of plaintiff, in this: that had defendant provided the necessary facilities and used due diligence in performing its duty as a common carrier in transporting said corn, it would have been

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delivered in New York by the 25th of November, 1882, but that by reason of such wrongful neglect said corn was not delivered in New York until about January 1st, 1883; that during such time of unreasonable detention so caused by defendant's negligence, said corn depreciated in value in the city of New York in the sum of five hundred dollars.

Defendant filed an amended answer denying each and every allegation in said petition, and setting out a special contract whereby and wherein it was agreed that for all loss or damage occurring in the transit of said corn, the legal remedy should be against the particular carrier only in whose custody the said corn should actually be at the time of the happening thereof, it being understood that defendant assumed no other responsibility than might be incurred on defendant's own road; and that said defendant performed all the conditions of said contract on its part; and that whatsoever damage occurred to plaintiff in consequence of delay and negligence was occasioned by delay and negligence on the lines of other carriers, to whom delivery was made by defendant to complete the transit to New York.

Plaintiffs filed a replication denying each and every allegation in said answer contained.

The case was submitted to the court on an agreed statement of facts, as follows: —

"The parties to this action, by their respective attorneys of record, submit this cause to the court and agree on the facts below set forth, saving objections as to irrelevancy and incompetency.

"That defendant, a common carrier, on the 15th and 16th days of November, 1882, received from plaintiff, at Charleston, Mo., five cars of bulk corn, making an aggregate of nineteen hundred and eighty-two bushels, to be transferred from the town of Charleston, in the State of Missouri, to the city of New York, in the State of New York, issuing therefor to plaintiff its two certain bills of

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lading, copies of which are hereto attached and made part of this statement.

"That there was an unreasonable delay in the transportation of said corn from the town of Charleston to the city of New York.

"That there was no delay upon defendant's road, but there was upon the line of defendant's connecting carriers, to whom defendant delivered the corn in question to complete the transit from Charleston to New York.

"That by reason of the negligence and delay on the line of defendant's connecting carriers, plaintiff sustained a loss and damage of twenty-one cents per bushel on said corn.

"That the freight charges for the entire route from Charleston to New York were paid by plaintiff to defendant's agent.

"That by reason of the delay and negligence on the line of the defendant's connecting carriers, plaintiff was put to an extra expense of twenty-eight dollars and fifty-seven cents ($28.57).

"That demand of payment of defendant by plaintiff was made on the 15th day of January, 1883, for the loss and damage incurred by plaintiff in the unreasonable delay in the shipment of grain in question.

"That no part of the amount claimed by plaintiff has ever been paid to plaintiff.

"That defendant is a corporation doing business in the State of Missouri, and organized under the laws of Missouri."

The face of the first bill has upon it, in writing and in print, the following words and figures, to wit: —

"[FORM 1165.]

"THE MISSOURI PACIFIC RAILWAY,

"ST. LOUIS DIVISION IRON MOUNTAIN RAILWAY.

"Received at Charleston, Mo., Station, November 15, 1882, from Sol. Rosenstein & Co., the following articles in

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apparent good order and condition (excepted as noted below), to be forwarded to Stillwell, Winslow & Co., at New York, N. Y., under the conditions and exceptions printed upon the back of this receipt.

"MARKS.	ARTICLES.	WEIGHT SUBJECT TO CORRECTION.
"O. & M. 3544.	Bulk Corn.	22,910.
O. & M. 2079.	" "	22,190.
O. & M. 2413.	" "	22,275.

"The second bill is the counterpart of this one in form."

Among other exceptions on the back of the bills of lading is one in words as follows: —

"It is further especially understood that, for all loss or damage occurring in the transit of said packages, the legal remedy shall be against the particular carrier only in whose custody the said packages may actually be at the time of the happening thereof, it being understood that the Missouri Pacific Railway Company, in receiving the said packages to be forwarded as aforesaid, assumes no other responsibility for their safety or safe carriage than may be incurred on its own road."

The plaintiff prayed the four following declarations of law, which the court refused to give: —

1. "The court declares that under the law and the facts plaintiff is entitled to recover.

2. "The court declares the law to be that a common carrier in this State will not be permitted to contract against its own actual negligence or that of its agents, servants or employes.

3 "The court declares the law to be that when a common carrier contracts to carry merchandise for an entire route, consisting of several roads, it will not be permitted

to stipulate from liability beyond the terminus of its own line.

4. "The court declares the law to be that whenever any property is received by a common carrier, to be transported from one place to another, within or without this State, or when a railroad or transportation company issues receipts or bills of lading in this State, the common carrier or railroad company or other transportation company issuing such bills of lading or receipts shall be liable for any loss, damage, or injury to such property, caused by its negligence or the negligence of any other common carrier, railroad, or transportation company to which said property may be delivered, or over whose line such property may pass."

The court, of its own motion, gave an instruction to the effect that on the facts stated in the agreed case plaintiff can not recover. Plaintiff took a non-suit with leave, and the trial court refused to set the non-suit aside.

The only question presented by the record, or which has been urged upon our attention by counsel, is, whether the acceptance of the bill of lading by plaintiff relieved the defendant from the liability which the statute imposes upon it for the negligence of the railroad company other than defendant over whose line the goods in question passed on their way to their destination.

The intention to waive the terms of the statute, on the part of the shipper, is not clear. By no fair construction can the word "package" be made to apply to corn in bulk. A package is a bundle put up for transportation or commercial handling. *The United States* v. *Goldback*, 1 Hughes, 530. It is said a bale of cotton may be, in some sense a package. *Lamb* v. *Railroad Co.*, 2 Daly, 480. But it is held that it is not a package within the meaning of the word as used in receipts, such as the one before us for construction. *So. Ex. Co.* v. *Crook*, 44 Ala. 468. In *McCoy* v. *E. & W. Transp. Co.* (42 Md. 499), it is held that the word "package," in a similar exemption

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clause in a bill of lading, can not be held to apply to corn in bulk.

How far it is competent for a railroad corporation to exempt itself from the operation of the statutory provision under consideration in this case, by providing an exemption on the back of its bills of lading, and what consideration there was in the case before us to support such an exemption are questions that we need not now discuss. It is enough that we are clearly of the opinion that if it was the intention of the carrier in the present case to exempt himself from liability for negligence of the other carrier on the connecting line to whom he delivered the goods, he should have done so in clear and distinct terms. The shipper in the present case might well suppose that the clause as to packages on the back of the receipt taken by him did not apply to his corn in bulk.

This being so, it does not appear why the petition does not state a good cause of action, nor why, upon the pleadings and agreed statement, the plaintiff was not entitled to recover. The judgment is therefore reversed, and judgment will be entered here for plaintiff.

Judge THOMPSON concurs. Judge LEWIS is absent.

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EDMUND P. WALSH, Appellant, *v.* LOUIS BOSSE, Respondent.

November 11, 1884.

1. **SCIRE FACIAS — JUDGMENTS.** — A proceeding by *scire facias* to revive a judgment is an action, and the judgment therein is a new judgment.
2. **—— LIMITATIONS.** — A judgment in *scire facias* to revive a judgment operates to avoid the statute of limitations, which then runs from its date and not from that of the original judgment.

APPEAL from the St. Louis Circuit Court, ADAMS, J.

Reversed and remanded.

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KEHR & TITTMANN, for the appellant: *Scire facias* is an action. — *Milsap* v. *Wildman*, 5 Mo. 428; *Simpson* v. *Watson*, 15 Mo. App. 425. The statute runs from the date of the judgment of revivor. — *Mullikan* v. *Duval*, 7 Gill & J. 360; *Weaver* v. *Books*, 38 Mo. 255; *Fagan* v. *Bentley*, 32 Ga. 534.

L. GOTTSCHALK, for the respondent: *Scire facias* is a judicial writ, and not a new suit. — *Humphreys* v. *Lundy*, 37 Mo. 320; *The State* v. *Heed*, 62 Mo. 559; *Ellis* v. *Jones*, 51 Mo. 180; *Greer* v. *Bank*, 10 Ark. 456; Freem. on Judg., sects. 442, 444.

BAKEWELL, J., delivered the opinion of the court.

Judgment was rendered against defendants on December 3, 1860, in the St. Louis court of common pleas. This judgment was revived by *scire facias*. The writ was duly served on all the defendants, and the judgment of revival was entered in the same court, on May 23, 1864, in due form, for $1,650, the amount of the original judgment. The petition in the present case sets out these facts, and asks judgment for $1,650, with interest from December 3, 1860.

Defendant demurred, on the ground that the petition does not set forth constitutive facts, in this: that it appears that the judgment on which this suit was brought was rendered more than twenty years before the petition in this case was filed, and that the relief prayed for is barred by the statute of limitations. The demurrer was sustained, and there was final judgment for defendant, plaintiff declining to plead over.

The determination of the question presented by the record necessarily involves a consideration of the nature of the proceeding by *scire facias* to revive a judgment. There is nothing in our statutory provisions on the subject (Rev. Stats., sects. 2732–2736), to throw light upon this, or to modify the nature of the remedy.

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It is a supplementary remedy, partly in the nature of an action, and partly of an execution, which often follows on a suit as being the only method of enforcing, under particular circumstances, the judgment therein obtained. "A *scire facias* is deemed a judicial writ, and founded on some matter of record as judgments. * * * And though it be a judicial writ, or writ of execution, yet it is so far in the nature of an original, that the defendant may plead to it, and it is in that respect considered as an action, and therefore it is held that a release of all actions is a good bar to a *scire facias*. But for some purposes it is only considered as a continuance of the original action." Bac. Ab. 8, 598.

The common-law course of proceeding incident to a *scire facias* is described by Mr. Stephens as follows:—

"The writ is sued out of the court in which the judgment is recorded, and it is made returnable in the same court on some day in term. It is then left with the sheriff, in order that the defendant may be summoned upon it, and if he fails to appear in due time after the summons served, or after due endeavor to effect a service, the plaintiff in *scire facias* will be entitled to sign judgment by default, and take out execution. If, on the other hand, the defendant in *scire facias* appears, the plaintiff delivers a declaration to which the defendant is to plead, and the subsequent course of proceedings to issue, trial, judgment, writ of error, and execution, is substantially the same as in that of an ordinary action. But it is a settled rule that the defendant in *scire facias* shall never be allowed to plead any matter which he had the opportunity of pleading in the original action. For the object of the proceeding is not to afford him the means of bringing the original judgment into question, but of showing, if he can, that some matter has occurred since that judgment was given which entitles him to resist the execution." Steph. Black. 3, 656.

We had lately occasion to consider the nature of the proceeding by *scire facias*, in the case of *Simpson* v. *Watson*

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(15 Mo. App. 425). We there said, that it was of the nature of an action. It is, in all cases, necessarily of the nature of an action, because the defendant may plead to it; and the common-law writers all say, that, whenever defendant may plead to any writ, whether original or judicial, it is in law an action. "And though," says Mr. Foster in his elaborate treatise on *scire facias*, "to revive a judgment, it is a judicial writ to continue the effect of, and have execution of the former judgment; yet it is in the nature of an action, because defendant may plead any matter in bar of execution upon the first judgment." p. 13. And it will appear by reference to the cases cited in support of this statement, that it has been held in a variety of English cases, that *scire facias* to revive a judgment is an action; and in *Holmes* v. *Neuland* (5 Q. B. 370), it is said, that "it is in effect a new action, where the defendant may defend himself by pleading what has been done under the original judgment."

The same learned author says (p. 30): "And if within twenty years, a judgment is revived by *scire facias*, a new right is acquired by such judgment from which new right the limitation of twenty years begins to run, and not from the original judgment," and this statement of the text is fully borne out by the cases cited, to all of which we have referred.

In *O'Brien* v. *Ram* (3 Mod. 189), it is said: "As to the *scire facias* it is true at the common law, if a man had recovered a debt, and did not sue forth execution within a year and a day, he must then bring a new original, and the judgment thereon had been a new recovery; but now a *scire facias* is given by the statute instead of an original, and therefore a judgment thereon shall also be a new judgment; for, though it is a judicial writ, yet is in the nature of an action, because the defendant may plead any matter in bar of the execution upon the first judgment, and it is for this reason that a release of all actions is a good bar to it.

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Besides, an action of debt will lie upon a judgment on *scire facias*, which shows that it is an action distinct from the original." And this case is referred to with approval by Lord Holt in *Goodyeer* v. *Gresham* (Skinner, 682), where he says that *scire facias* to revive a judgment is an action in the nature of an original, and that, though the judgment in the *scire facias* does not alter the nature, it changed the property of the debt in the case before him, and that an action of debt may be brought upon an award of execution.

The case of *Farrell* v. *Gleason* (11 Cl. & Fin. 700), was this: A judgment obtained in 1813 was revived by *scire facias* in 1828. A bill in equity was filed to satisfy the judgment out of the debtor's estate. The statute of limitations was pleaded, and it was held, on appeal to the house of lords, that the *scire facias* created new rights and that the plea was no bar.

And in *Farren* v. *Beresford*, (10 Cl. & Fin. 702), it was held as Foster states (Foster, Scire Facias, 30), that if within twenty years, a judgment is revived by *scire facias*, a new right is acquired by such judgment, from which new right the limitation of twenty years begins to run and not from the original judgment. Learned counsel for appellant says that the author referred to, misapprehends and misstates the effect of this decision. But an examination of the case shows that the statement of Mr. Foster is correct. The case was most carefully considered in the Irish exchequer chamber, all the judges delivering separate opinions. The judgment of the queen's bench was there affirmed. On appeal to the house of lords, the judgment was reversed. But this reversal did not affect the decision upon the point considered by the exchequer chamber, but was upon the question of pleading, the lords holding that the previous *scire facias* must be set forth in the declaration in *scire facias*, otherwise, if more than twenty years have elapsed since the original judgment, a plea of the statute would be

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a good plea in bar, and a replication setting out the previous *scire facias* and revival of the judgment within twenty years, would be a departure, as setting up a new right, and would be bad.

The question of pleading was not insisted upon in the exchequer chamber, and the case there wholly turned upon the language of the English statute of limitations (3 and 4 Wm. IV., ch. 27, sect. 40), and the nature of the proceeding by *scire facias* to revive a judgment.

The English statute provides that no action shall be brought to recover money secured by judgment, mortgage, or lien, but within twenty years "next after a present right to receive the same shall have accrued to some person capable of giving a discharge for the same," unless some of the money shall have been paid, or an acknowledgment given.

The judges delivered separate opinions.

Ball, J., says that there is nothing in the view that the words "secured by the judgment," mean only the original judgment of 1810, and can not embrace the revivor of 1817; that it can not be held that the judgment of revivor was only an award of execution, and not a judgment in the legal acceptation of the term; that such a view is contrary to *O'Brien* v. *Ram* (*supra*); that an action of debt may be brought on a judgment in *scire facias*, and that it is an original judgment, capable of securing a debt.

Perrin, J., says, that the judgment on the *scire facias* was "manifestly and unquestionably, for some purposes at least, a new judgment, and one that confers a present right within the meaning of the statute."

Pennefather, B., considers it a startling proposition, that the solemn judgment in *scire facias*, that a debt is unsatisfied and plaintiff entitled to satisfaction, should be treated as of no effect. "Let us see," he says, "what is the nature of a judgment in *scire facias*, and what is the effect attributed to it. It is not merely the adjudication of

the court that the plaintiff shall have execution of his former judgment; but it may bind and affect persons who were not parties to the original judgment. It has the effect, therefore, not only of reviving the former judgment, giving a new right to receive what is due on it against those formerly bound by it, but of enabling the party to enforce his demand against others. It does this by the judgment of the court, and in doing so, it confers a new privilege, a new right, and a new terminus." He argued that as costs are given in *scire facias* on a judgment, it is absurd to hold that these may be recovered within twenty years, and not the principal.

Torens, J., considers the question closed by the authority of *O'Brien* v. *Ram* (*supra*), and by *Crafts* v. *Hewson*, which followed that case.

Crompton, J., adheres to his opinion in the queen's bench. Burton, J., Johnson, J., Dougherty, C. J., and Burke, C. J., concur. The chief baron and Baron Richards were absent; but the latter had, on a previous day of the term, decided *Ryan* v. *Cambie* (2 Ir. Eq 328), in exact conformity with the opinion of the majority of the court in this case.

Foster, J., alone dissents, and delivers a dissenting opinion. He holds that *O'Brien* v. *Ram* decides merely that a judgment obtained against an unmarried woman, which has been revived against her husband during coverture, shall be considered as an original judgment against him, but does not decide that it is an original judgment to all intents and purposes. He holds that the statute under consideration must, from the language used, be held to make the sameness of the money the test; and that, as a *scire facias* to revive is not, to all intents and purposes, a new action, but, to some purposes, only a continuation of the former suit, the statute runs from the date of the first judgment.

In the house of lords as we have said, the judgment

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was reversed on the question of pleading alone. Lord Lyndhurst in delivering the opinion of the court (in which the judges were unanimous), says: "I agree with her majesty's judges in thinking that, in this case a new right, was acquired by the judgment in *scire facias* in 1817. But the plaintiffs below having declared on the judgment of 1810, and the plea under the statute of 3 and 4 William IV (ch. 27) being, as I think, a sufficient answer to the claim stated in the writ, the plaintiffs below could not set up by way of replication *a new right* in answer to the plea. It is clear, I think, that this is a departure, and that, upon the record thus framed, the defendant below was entitled to judgment" 10 Cl. & Fin. 339.

It has been held again and again in America that *scire facias* to revive a judgment is an action, or in the nature of an action (*Hubbard* v. *Balls*, 7 Ark. 443; *Barron* v. *Bailey*, 5 Fla. 18); that it is a new judgment (*Mullikin* v. *Duval*, 7 G. & J. 355; *Weaver* v. *Gresham*, 38 Md. 264); that the *scire facias* operates to avoid the statute of limitations by a new judgment, from the date of which the statute again begins to run. *Lambson* v. *Moffett*, 61 Md. 429; *Fagan* v. *Bentley*, 32 Ga. 534.

It was early held in Missouri (*Milsap* v. *Wildman*, 5 Mo. 428), that a *scire facias* is an action, and a suit within the the meaning of the revised code. In *Wood* v. *Ellis* (10 Mo. 384), it is held that a judgment of revival in *scire facias* is a judgment from which the defendant can not have relief by *audita querela*, where there was a return of due service, and defendant had neglected to plead in avoidance. In *Humphreys* v. *Lundy* (37 Mo. 320), the court holds that a proceeding by *scire facias* is not a new suit upon the old judgment, and that it is error to add interest to the amount of the original judgment when it is revived; and that the proper entry is an award of execution for the amount of the original judgment, with interest from its date and costs. The learned judge who delivers the opinion of

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the court, cites an Arkansas case in support of an assertion that *scire facias* is not the commencement of an action to which the statute of limitations may be pleaded. And this is in accordance with what is undoubtedly held, and with what was said by us in *Simpson* v. *Watson* (*supra*), that sometimes, and for some purposes, a *scire facias* on a judgment is regarded as the continuation of a former suit. In some respects, it undoubtedly is so; yet, in others, it may be, and is, nevertheless, a new suit. That it is not an action upon the original judgment, and that it is error to enter a new judgment for the amount of the original judgment and interest added, is a matter as to which there can be no controversy at all. The judgment is, that plaintiff have execution. *Coomes* v. *Moore* (57 Mo. 338), merely follows *Humphreys* v. *Lundy*, in holding that a *scire facias* upon a judgment is not the beginning of a new action upon the old judgment to which the statute of limitations may be pleaded.

The case in *George* v. *Middough* (62 Mo. 549), was this: Judgment was obtained in 1859, which was revived from time to time, the last revival was in 1867. The court held an execution issued in 1872, a nullity, because "the statute provides that plaintiff may sue out a *scire facias* to revive a judgment and lien at any time within ten years; but that, after the expiration of ten years from the rendition of the judgment, no *scire facias* shall issue. The last judgment of revival on *scire facias* was in 1867, and its lien expired before the executions were issued; the executions therefore derived no force from these liens, or the revivals had under them; and, as more than ten years had expired from the time the original judgments were rendered, the executions were nullities." This seems to be in accordance with the express provision of the statute; but it is not inconsistent with the position assumed by the appellant here, that a revived judgment confers a new right upon the plaintiff, which can be enforced by an action of debt, and that

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a new date and terminus is fixed by the revival, from which the presumption of payment begins to run.

Our statute provides (Rev. Stats. 3251), that every judgment, order, and decree of any court of record, shall be presumed to be paid and satisfied after the date of twenty years from the day of its rendition; but such presumption may be repelled by proof of payment or written acknowledgment of indebtedness made within twenty years. There is no other statutory provision as to limitation to actions of debt on judgments. The suit at bar was an action of debt upon a judgment, order, or decree, that plaintiff have execution for a certain amount; that order was a judicial determination that the debt remained unpaid, in a proceeding in the nature of an action, where defendant had notice, and was admitted to plead. It was a judgment from which an appeal could lie; in its nature final.

We think that plaintiff's petition sets forth a cause of action, and that the demurrer should have been overruled. The judgment is reversed and the cause remanded. Judge THOMPSON concurs. Judge LEWIS is absent.

H. D. McLEAN ET AL., Respondents, *v.* W. E. BURR ET AL., Appellants.

November 11, 1884.

DEEDS OF TRUST — PAYMENTS TO PRESERVE PROPERTY — LIENS. — A lien for insurance premiums paid by one bondholder to preserve the mortgaged property may be declared and enforced, though the holders of other bonds secured by the deed of trust had no actual notice of such payment.

APPEAL from the St. Louis Circuit Court, LUBKE, J. *Affirmed.*

HITCHCOCK, MADILL & FINKELNBURG, for the appellants.

OVERALL & JUDSON, for the respondents.

BAKEWELL, J., delivered the opinion of the court.

Plaintiffs claim that they are beneficiaries under a deed of trust given to secure certain bonds, etc. Defendants are trustees in the deed, Burr being one of the original trustees, and his co-defendants, Snurmacher and Crane, having been substituted in place of trustees who resigned. This action is brought to recover, from the net proceeds of the foreclosure in the hands of the trustees, certain sums advanced during the existence of the mortgage by plaintiffs, for premiums of insurance effected upon the mortgaged premises. The cause was tried without a jury, and there was a finding and judgment for plaintiff.

There was evidence tending to show the following state of facts: —

On December 11, 1882, the Atlantic Milling Company, a corporation, executed to William E. Burr, Gerard B. Allen, and John Wahl, a deed of trust upon a lot in the city of St. Louis on which was then being erected a four story steam flour mill. The deed was to secure the payment of one hundred bonds of the company, of $1,000 each, with semi-annual coupons of $30 each, attached to each bond. The deed of trust provided that the building and improvements were to be insured during the existence of the deed of trust for at least $100,000, the policies to be assigned to the trustees, and to be satisfactory to them; and that, in default of such insurance, the premiums may, "in his or their option, be advanced and paid by said party of the third part or assigns, holder or holders of said bonds or coupons; in which case the sum or sums so advanced and paid shall be a further debt also secured by these presents; and which shall be repaid on demand by said party of the first part, representative, or assigns, to the person or persons advancing the same, together with interest thereon at the rate of ten per cent per annum from date of such advance until repaid."

The deed further provides that, on default and foreclos-

ure, the trustees, after paying costs and expenses, and compensation to the trustees, "shall repay to any person or persons who may, under the covenants hereinbefore set forth, have advanced or paid any money for taxes, insurance, or judgments upon statutory lien claims, as above provided, all sums so by him or them advanced, and not already repaid, together with interest thereon at the rate of ten per cent per annum from date of such advance until day of repayment."

This deed of trust was foreclosed, and the premises sold by defendants the trustees, on April 4, 1884, for $27,000 cash. Of this sum, after deducting all expenses, etc., about $26,500 remained in the hands of the trustees; and, at the date of the trial, more than enough of this sum remained in the hands of the trustees to pay plaintiff's claim and interest in full.

The premises on which the insured property was situated had formerly belonged to Mr. George Bain, who operated there a flour mill called the Atlantic Mills. Afterwards the property was owned and the business conducted by a corporation called the Atlantic Milling Company, of which Bain was president. The mills were being rebuilt, and were nearly completed at the date of the insurance in question. Before that, whilst they were being put up, the improvements were insured for about $30,000, to cover builders' risks. This insurance expired at the time the new insurance was taken up. Before the fire, the credit of Mr. Bain and of the Atlantic Milling Company was very good. After the fire the credit of Mr. Bain and of the company was very poor.

The plaintiffs had been in business together, at the date of the insurance, as insurance brokers in St. Louis, for about twenty years. They had placed insurance for Mr. Bain during ten years, and knew him well. They owned five bonds of the Atlantic Milling Company. These bonds had the terms of the deed of trust printed on them. Mr.

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Bain applied to plaintiffs to place $113,000 insurance on the premises in question. This application was made early in February, 1883. The premises were considered well worth the insurance at the time; and it was thought by plaintiffs that this amount of insurance was no more than enough to cover the bonds and coupons secured by the deed of trust. The risk was extra-hazardous, and was to be placed in several companies. This took some time, as, more than once, after the agent here had accepted the risk, the foreign company would refuse to ratify the agent's act, and another policy had to be taken out. The insurance was all effected during February. The policies were all to be payable to the trustees under the deed of trust, and to be delivered to them. Both Mr. Wahl and Mr. Burr, trustees in the deed of trust, frequently came to see plaintiffs during February, and manifested interest in the matter, and anxiety that the insurance should be effected. About the first of March the policies were all delivered to Mr. Burr by plaintiffs. He made no objection to the amount of insurance. Neither the milling company nor Mr. Bain were able to pay the premiums; and, on the 1st of March, plaintiffs, who were responsible for the premiums, presented their account to Mr. Bain, and being unable to get the cash, took the notes of the milling company at six and nine months for $5,080.50, the amount of the premiums. Plaintiffs testified that they knew at the time that the Atlantic Milling Company could not pay the premiums, and that they did not know that Mr. Bain would be able to raise the money to do so. But they were willing to advance the money themselves, as they believed that they would have a lien under the deed of trust, and that they were therefore safe. They discounted these notes, and paid the premiums. Mr. Harrison says that the condition of the company and of Bain was known to Mr. Burr, and that he could not have expected that the premiums would be paid by Bain or the company at the time. The company

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failed for a very large amount, in April, 1883, before the notes matured. On May 5, 1883, $575.80 was paid on one note by the company; and on July 3, 1883, the company paid $500 on the other note. No more could be collected from the company or Bain. The notes were taken up at maturity by plaintiffs, and are now held by them. About the time that plaintiffs were considering the proposition to take the notes, Harrison had a conversation with Burr, in which Mr. Burr said that the payment of the premiums was a lien under the deed of trust; and, before taking the notes, Harrison, as he did not have his bonds in his possession, went to the recorder's office and copied the provision of the deed of trust as to payment of premiums, to assure himself that he was safe. Harrison and McLean had conversations with Mr. Burr afterwards, in which they spoke of foreclosing the deed of trust to recover their premiums, and in which Mr. Burr said that the money paid for the premiums was well secured under the deed and that they had better let the matter run along. At the time the notes matured, the policies had eight or nine months to run.

Defendants asked the following declarations of law, which were refused by the court: —

"1. Under the evidence plaintiffs are not entitled to recover.

"1. If the court finds from the evidence that plaintiffs were employed by the Atlantic Milling Company as insurance brokers to procure insurance upon the property described in the deed of trust; that, in procuring said insurance, they acted as agents of said milling company, for a compensation; that when they presented their bill for premiums to the milling company, said milling company proposed to give them its notes for the amount of the premiums; that plaintiff, thereupon, accepted two notes for the amount due, payable to themselves, and maturing respectively in sixty and ninety days, of all which facts and circumstances, neither the trustees in said deed of trust, nor the other

bondholders under said deed of trust, had any knowledge or notice; that, thereupon, plaintiffs delivered the policies of insurance to defendants without notice of any claim for unpaid premiums; that, afterwards, the Atlantic Milling Company became insolvent, and defaulted in the payment of said notes, then plaintiffs are not entitled to recover in this action, or from these defendants, the amount for which they gave such credit and took said notes, or any part thereof."

At the instance of plaintiffs, the court gave the following declaration of law: —

"If it appears from the evidence that plaintiffs, on or about March 1, 1883, being then holders of bonds secured by the deed of trust, on failure of the Atlantic Milling Company to pay the premiums for the insurance when payment was demanded, advanced the money for such premiums, and paid the respective companies, relying upon the security afforded them as bondholders in making such advances by the provisions in the deed of trust, then they are entitled to recover for the amount of such advances not already paid by the Atlantic Milling Company, notwithstanding plaintiffs, before making such advances took from the Atlantic Milling Company its notes for the amount of said premiums, and, by indorsing and discounting said notes, raised the money advanced by them as aforesaid, said notes being subsequently taken up by plaintiffs on failure of Atlantic Milling Company to pay the same."

We think that there was evidence that fully warranted the judgment. According to the terms of the deed of trust, the plaintiffs, as bondholders, having advanced money to pay premiums of insurance, and thus diminish the risk and enhance the security to the beneficiaries in the deed of trust, were entitled to a lien for repayment, which is prior to that of those who were merely bondholders. There does not seem to have been any concealment or bad faith about the transaction; nor do we see any force in the

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suggestion that plaintiffs, by giving this credit to the company, deceived the bondholders and lulled them into any false security. The nature of the transaction is not affected by the fact that plaintiffs were insurance brokers. It is testified that the trustees, or some of them, knew enough of the financial condition of the company and of Mr. Bain to make it reasonable for them to suppose that this large sum for premiums was not paid by the mortgageor. They were aware of the terms of the deed of trust, and there is some evidence that Mr. Burr, before the notes were given for the premiums, had express notice that the premiums had been advanced by the plaintiffs, and that they looked to the deed of trust for security. The testimony is, that the policies by their terms, might be cancelled by the insuring companies at any time, on returning the unearned premiums. As trustees for the creditors, the trustees in the deed of trust knew of the insurance and its amount, were anxious that it should be effected, and acquiesced in the claim of plaintiffs that they were secured by the deed of trust, about the time that the notes were taken by them. The taking of the notes was not in itself any waiver of the lien. The court seems to have found as a fact that plaintiffs made the advance relying on the security afforded them as bondholders by the clause in the deed as to such advances. We do not think that it can be held as a matter of law in the construction of the deed, that notice to the bondholders at the time the advance was made, was essential to enable the persons making it to assert a lien under the deed of trust.

We think the judgment should be affirmed. It is so ordered. All the judges concur.

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CITY OF ST. LOUIS, Appellant, v. JOHN WITHAUS, Respondent.

November 11, 1884.

1. **CONSTITUTIONAL LAW — CHARTER — ORDINANCES. — The municipal assembly of the city of St. Louis has no power, at any special session thereof, to pass an ordinance as to a matter in no way alluded to in the opening message of the mayor.**

2. **—— Statements in the opening message that the mayor would propose other legislation, and subsequent messages proposing other legislation not specifically alluded to in the first message, will not authorize legislation on such subjects.**

APPEAL from the St. Louis Court of Criminal Correction, NOONAN, J.

Affirmed.

LEVERETT BELL and ASHLEY C. CLOVER, for the appellant.

KLEIN & FISSE, for the respondent.

BAKEWELL, J., delivered the opinion of the court.

The defendant was prosecuted in the police court of the city of St. Louis for a violation of ordinance 12,509, entitled "an ordinance to prohibit heavy driving on certain streets," approved August 4, 1883. On trial anew in the court of criminal correction, defendant was discharged.

It appears from the agreed statement of facts upon which the cause was submitted below, that the ordinance in question was passed at a special session of the municipal assembly, called by the mayor as provided by the city charter. Its object is that indicated by its title.

It is provided by section 18 of article 4 of the charter of St. Louis (2 Rev. Stats. 1592), that "the mayor may, by proclamation, call special sessions of the assembly, giving not less than three days' notice, and shall specially state to them when assembled the objects for which they

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have been convened, and their action shall be confined to such objects."

The special session at which the ordinance under consideration was passed, was assembled by virtue of a proclamation of the mayor dated June 6, 1883, which directed that it should commence on June 9, 1883.

When the two houses were assembled under this proclamation, the mayor stated the objects for which they were convened in a message in which the mayor says: "The primary object of the present special session is the adoption of an appropriation bill. * * * I also submit to you the dram-shop ordinance. * * * A third matter to which your attention is called is the question of licensing meat-shops." * * * The message concludes as follows: —

"I have no other legislation to suggest at present. It is not my wish to unnecessarily prolong the session. I have called it to obviate any embarrassment arising by the recess taken in the first special session from June 5th to October 16th. It rests with you to determine when the special session shall end. It must, of course, terminate prior to October 16th. I am not averse to submitting for your consideration any measure, if satisfied that the public interests demand that it shall be heard."

The three objects set forth above, are the only ones named in the message as objects for convening the session.

In the opening paragraph of the message, the mayor says: "You are convened in special session to-day, under the proclamation of the 6th instant, issued pursuant to section 18 of article 4 of the city charter; and I will briefly state the objects for which you are convened, first remarking, however, that your action is, by the above mentioned provision of the charter, confined to such objects as I may now, or shall hereafter during the pendency of the session submit to you."

In accordance with the intimation thus conveyed, G. W.

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Parker, temporarily and lawfully acting as mayor, on June 15, and on a day when the assembly was in session under the above proclamation, sent a message to the assembly submitting for consideration the ordinance to prohibit heavy driving on certain streets, now before us, which had been introduced through the house of delegates. It is plain that this was not one of the objects named in the mayor's message delivered upon the assembling of the special session.

The state constitution provides (art. V., sect. 9), that the governor may convene the general assembly on extraordinary occasions by proclamation "wherein he shall state specifically each matter concerning which the action of that body is deemed necessary;" and the general assembly is forbidden (art. IV., sect. 55), when in extra session, "to act upon subjects other than those specially designated in the proclamation by which the session is called, or recommended by special message to its consideration by the governor after it shall have convened."

The charter and the constitution seem to differ in their provisions as to special sessions. By the one, the governor is authorized to recommend for consideration by special message objects not embraced in the proclamation calling the session; by the other, the mayor is obliged to state specifically, in his first message to the assembly, the objects for which it is called, and no omission as to this can be repaired by any subsequent special message. This seems to be the obvious consequence from the plain language of the charter. Nothing is said as to any subsequent special messages, but the action of the assembly is expressly restricted to such objects as the mayor shall state to them "when assembled" as the objects of the session. The words "when assembled" must have some meaning. Had the charter merely said "the mayor shall state to them the objects," etc., it might be reasonably contended that this statement might be made from time to time during the

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session, as new matter for consideration might occur to the mayor. But the charter is express that legislation at a special session must be confined to such objects as the mayor "shall specially state to them when assembled," that is, according to the ordinary use of the phrase "upon their assembling" or "so soon as they are assembled." The language can not be intended to mean that the mayor's message must not be delivered before the assembly convenes, or after it has adjourned. The message plainly could not be delivered to a body not in session. If the words do not mean "once for all, upon the assembling of the body," they mean nothing at all.

When a legislative body is called in extra session upon extraordinary occasions, its action is not confined to the subjects mentioned in the proclamation or message, unless the organic law provides that it should be so confined. But such provisions are found in the constitutions of many states; the object of such restriction is obvious; and where it exists in the organic law, no legislation in violation of the restriction can be sustained. Cooley's Const. Lim. (6th ed.) 155, 187.

The language of the constitution of Tennessee is, or was, that the governor "may on extraordinary occasions, convene the general assembly by proclamation; and shall state to them, *when assembled*, the purposes for which they have been convened; but they shall enter upon no legislative business except that for which they were specially called together." It was held there that the object of the provision was to check overlegislation, and to render laws somewhat more stable, by furnishing a period of at least two years during which they may be, in some degree, subjected to the test of experiment. It was held there, that the legislation of an extra session may embrace any subject that properly springs out of the business for which the legislature were called together. *Mitchell* v. *F. & C. S. Co.*, 3 Humph. 456.

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But I do not believe that this or similar language has ever been held to sanction successive messages introducing new subjects one after another to the extra session, not alluded to in the call.

The charter of St. Louis provides for one session of the assembly to be held annually. To uphold the present ordinance, in view of the facts above set forth, would be to maintain that the assembly in special sessions may legislate upon any subject whatever within the scope of the powers of the assembly, that may happen to suggest itself to the mayor, or to be suggested to him during the special session; and thus a special session would be hardly distinguishable from a general session. We are of opinion that the charter provision was meant to guard against such general legislation at a special session, to impose a limit to legislative action, to be defined when the assembly meets, to confine the assembly when assembled in special session, to such objects as the mayor may have had specifically in view in calling the special session, and to compel the mayor to state definitely and specifically to the assembly, so soon as it convenes, the particular objects for which he has called it together in special session.

If we are right in the view which we take of this provision of the charter it becomes unnecessary to consider the other questions as to the validity of the provisions of the ordinance before us, which are elaborately argued in the briefs of learned counsel for respondent and the city.

We are of opinion that the passage of the ordinance under the circumstances set forth above, was *ultra vires* of the municipal assembly in the special session at which it was passed; and for this reason, we affirm the judgment of the court below. Judge Thompson concurs. Judge Lewis is absent.

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LOUIS S. BAUER ET AL., Respondents, *v.* ALEXANDER MILLER, Appellant.

November 11, 1884.

1. PRACTICE — JUDGMENTS — REVIVOR — JUSTICES — EXECUTIONS. — A transcript of the proceedings under which a judgment is revived before a justice, when filed in the circuit court, warrants the issuance of an execution from such court.
2. —— An error of the justice in including accrued interest in reviving a judgment, can not be rectified on application to quash the execution issued thereon by the circuit court.
3. —— An execution issued by the circuit court on a justice's judgment will not be quashed because the justice's transcript does not show the manner of service upon the defendant, where he appeared and defended the action.
4. —— EVIDENCE. — A certificate of the justice showing the issuance of execution and a return of *nulla bona*, though not a part of the transcript, if admitted without objection, is *prima facie* evidence which justifies the issuance of execution on the transcript.

APPEAL from the St. Louis Circuit Court, LUBKE, J. *Affirmed.*

F. GOTTSCHALK, for the appellant: The revival of a judgment is not a civil action. — *Humphreys* v. *Lundy*, 37 Mo. 320. Upon filing transcript in circuit court, this court acquires jurisdiction, etc., and may set aside or modify the judgment (*Bauer* v. *Bauer*, 40 Mo. 61); and may quash the execution issued thereon. — *Bain* v. *Chrisman*, 27 Mo. 293; *The State* v. *Metzger*, 27 Mo. 65; *Ex parte James*, 50 Mo. 280; *Pratt* v. *Canfield*, 67 Mo. 48. A mere certificate of a justice is not evidence. — *Carr* v. *Youse*, 39 Mo. 346.

JOHN JOHNSON, for the respondents: The transcript of the revived judgment was all that was necessary. — *Corby* v. *Tracy*, 62 Mo. 513. It was sufficient. — *Jeffries* v. *Wright*, 51 Mo. 216; *Frause* v. *Owens*, 329. The justice's certificate authorized the issuance of execution. — *Ruby* v. *Railroad Co.*, 39 Mo. 480.

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BAKEWELL, J., delivered the opinion of the court.

We adopt the statement of appellant, which is as follows: —

"Appellant filed in the circuit court a motion to quash two executions issued against him in favor of respondents, for the reasons: —

"1. That the same include illegal interest.

"2. That there is not filed in said court any transcript of the original judgments.

"3. It does not appear that the justice before whom judgments were obtained had jurisdiction of the defendant.

"The plaintiffs in said judgments and executions having been served with notice of this application, appeared by counsel, and a hearing was had, at which appellant introduced as evidence the two executions dated January 26, 1884, issued from the clerk's office of the circuit court and reciting, that plaintiffs therein had, on August 9, 1871, recovered judgment before Charles F. Walther, a justice of the peace for the county of St. Louis, against said defendant, for $139.75 and costs, which was revived on April 17, 1883, by James McCaffrey, a justice of the peace for the city of St. Louis, for $243.87, for the debt, including interest of $143.35 on said original judgment and costs, — all of which appears from the transcript of the docket of said Justice McCaffery, filed April 18, 1883, and from a statement filed January 26, 1884, the other execution only varying in the amount, viz.: original judgment $170.50 revived for $294.55, including interest on original judgment and costs.

"Also the returns thereof showing a levy on real estate.

"Defendant then read in evidence the transcripts of the justice filed in the clerk's office, which are transcripts from the docket of Justice McCaffery, reciting that this is a "suit for revival of judgment rendered before Justice Charles F. Walther, August 9, 1871, for $139.75, for the debt and $2.60 costs. Affidavit of L. S. Bauer filed; cita-

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tion issued to Constable James F. Ryan, April 3, 1883; citation returned duly executed. On April 13th, parties being called, plaintiffs appeared in person, defendant by attorney; defendant moves to dismiss on the grounds of the docket entries in the cause before Justice Charles F. Walther; motion taken under advisement till April 17, 1883; on this day motion overruled, evidence heard, and it is adjudged that the judgment rendered before Charles F. Walther, on August 9, 1871, for $139.75 debt and $2.60 costs be revived, and that plaintiff recover of the defendant the sum of $243.87 debt, being the amount due, with interest included, in the sum of $143.35, from August 9, 1871, to date, together with costs of suit. *Fieri facias* issued April 17, 1883, returnable in ninety days."

The other transcript being the same, varying only in the amount.

These transcripts are indorsed: "Filed April 18, 1883. Charles F. Vogel, clerk."

Defendant also read in evidence the following two statements:—

"I, James McCaffery, a justice of the peace, * * * do hereby certify that the execution in the case of *Bauer and Bohle* v. *Alexander Miller*, issued to Constable James F. Ryan, April 17, 1883, in favor of Bauer and Bohle, and against Alexander Miller, for $243.87, was, on the 16th day of July, 1883, returned *nulla bona* by Constable James F. Ryan, and costs paid by plaintiffs. Given under my hand this 24th day of January, 1884.

"JAMES MCCAFFERY,

"*Justice of the Peace, City of St. Louis, State of Missouri.*"

The other statement only varying in amount.

Upon this evidence, which was heard on February 8, 1884, the motion was submitted, and thereafter, on same day, the execution plaintiffs filed in the clerk's office, the transcripts

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of the original judgments rendered by Justice Charles F. Walther in 1871. Whereupon the court, on the next day, February 9th, overruled the motion; defendant excepted; and filed on February 11th, his motion for a rehearing upon the grounds: —

"1. That the evidence submitted by plaintiffs after the submission of the motion, was incompetent, and gives without notice to, or knowledge on the part of the defendant and without opportunity to him to show cause against the reception thereof.

"2. That the executions were in fact and in law issued without authority of law and can not be legalized by subsequent acts.

"3. That the executions do not follow the judgment.

"4. That the judgments are void upon their faces."

And upon the hearing of this latter motion, defendant (appellant) read in evidence the two transcripts from the docket of Chas. F. Walther, filed since the hearing of the original motion; * * * from which it appears that this was a "suit on note, $170.55; note filed, summons issued to Constable R. Tobin, July 21, 1871, returnable August 9, 1871, at 7 to 10 o'clock a. m. Summons returned duly served. The cause came on to be heard; parties being called, plaintiffs answer; defendant makes default; the cause being on an instrument of writing and not denied under oath, it is considered and adjudged by the justice that the plaintiff recover of the defendant the sum of $170.55, his debt and cost of suit; that he have execution thereof. *Fieri facias* issued to Constable Tobin, August 9, 1871, returnable in ninety days; returned *nulla bona* November 7, 1871. Fee bill issued December 13, 1871. Costs paid."

This is followed by the certificate of James McCaffery, to the effect that the same is a correct and complete transcript of the entries and proceedings, as the same are of record on the docket of Charles F. Walther, late justice of the peace,

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and one of his predecessors in office, and whose dockets are now in his possession.

Both transcripts are alike, only varying in amount, and are indorsed: "Filed February 8, 1884. Charles F. Vogel, clerk."

Upon this evidence, the motion for rehearing was argued and submitted, and by the court overruled; exceptions taken and the case appealed, and the points relied on here, as they were below, are:—

1. That the issuing of said executions was illegal, for the reasons that at that time no legal transcript of the judgments was filed, nor was there legal evidence of the return by the constable of *nulla bona*.

2. That the original judgments were void, for want of notice to defendant.

1. The statute provides (Rev. Stats., sects. 3004–3006) for a proceeding before a justice of the peace to revive a judgment. This proceeding is upon notice and is in the nature of a *scire facias*, and the statute further provides (sect. 3007), that "a revived judgment shall, upon the entry of such revival, have the same force and effect in all respects as the original judgment." The defendant can not in the proceeding by *scire facias* to revive a judgment, plead matters that go behind the original judgment, even by showing that the domestic court in which it was rendered had no jurisdiction of the person or goods of defendant. *Miller* v. *Shackelford*, 16 Ala. 95. As to this, we need not repeat what we have so recently said in the case of *Simpson* v. *Watson* (15 Mo. App. 425). When the judgment is revived, it can not be necessary for any purpose, to file in the circuit clerk's office the transcript of the original judgment; no lien would have been created by that transcript, nor could execution have issued upon it. *Walsh* v. *Bosse*, *ante*, p. 231

2. It would seem that the justice, in reviving the judgment, erroneously entered a new judgment, including

accrued interest. It was his duty to revive the former judgment, and issue a new execution for the amount of the original judgment, together with the accrued interest and costs. Rev. Stats., sect. 3005; *Humphreys* v. *Lundy*, 37 Mo. 320. This was error which might have been rectified upon appeal. As defendant did not appeal, he must be held to have waived this error, and can not rectify it by a proceeding in the circuit court to quash or recall the execution. It is true that the statute provides (Rev. Stats., sect. 2999) in regard to transcripts of justices' judgments, filed in the circuit court, that "such judgment shall be under the control of the court where the transcript is filed," and that under this provision it has been held by the supreme court that the land court had jurisdiction, not only to recall the execution, but to set aside the judgment itself. *Bauer* v. *Bauer*, 40 Mo. 61. But that was in a case in which judgment had been rendered before the justice against a married woman upon a note executed by her during coverture, upon which execution was issued and levied against lands owned by her in fee. The court holds that her note was absolutely void, and intimates that the judgment upon it was void also, and on this ground, that the court might set aside the judgment; but we do not understand the supreme court as holding that, where no appeal has been taken, the circuit court, in a motion to quash execution issued upon a justice's transcript, filed in the circuit court, exercises ordinary appellate jurisdiction, and can correct an error, however manifest, that goes merely to the amount of the judgment, in a case where the justice had jurisdiction. The statute expressly provides that "no judgment rendered by any justice of the peace, shall be deemed invalid, stayed, or in any way affected by reason of any informality in giving such judgment, or entering the same, or other entry required to be made on the docket, or for any other default or negligence of the justice or constable by which neither party shall have been prejudiced."

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Rev. Stats., sect. 3011. The transcript of the justice who revived the judgment, showed that the citation on defendant has been returned, "duly executed." If the *revivor* was effected without such notice to defendant as the statute requires, he might, if prejudiced thereby, have had relief in a proper proceeding. But we consider that it was no ground whatever to quash or recall the execution issued on the transcript in the circuit court, that the transcript does not set out in what manner service was had, so as to show a compliance with the law in this respect. Under the ruling in *Bauer* v. *Bauer* (*supra*), and in accordance with what is said in *Ruby* v. *Railroad Company* (39 Mo. 480), defendant might, in this proceeding, have shown, if he could, that the judgment of *revivor* was void for want of proper service, or of any appearance on the part of defendant to cure this defect of service. But there was no pretence that defendant had not been duly served, and no offer to show any defect in the service; and the transcript showed that he appeared by attorney and defended before the justice.

3. It is objected that the justice's certificate above set out was no evidence that the execution was returned unsatisfied. The supreme court held in *Carr* v. *Youse* (39 Mo. 353), and in *Ruby* v. *Railroad Company*, (39 Mo. 481), that a mere certificate of the justice as to the issuing and return of execution, not a part of the transcript, is not admissible evidence against the objection of the other party. But it is also held, in the former of these cases, that, if admitted without objection or exception, it may be held sufficient. It is then at least *prima facie* evidence, which justifies the resort to process on the transcript. In the present case, no objection was saved to the introduction of this evidence, nor was there any attempt to contradict it.

For these reasons, we think the judgment should be affirmed. It is so ordered. Judge THOMPSON concurs. Judge LEWIS is absent.

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THE STATE OF MISSOURI, Respondent, v. WARREN F. McCHESNEY, Appellant.

November 11, 1884.

1. INDICTMENT — FALSE PRETENCES. — An indictment which charges that the defendant, by a trick, attempted to obtain "from certain persons, firms, and corporations then and there composing a voluntary association called the Brewers' Association of St. Louis, a more particular description of which is to the jurors unknown," a large sum of money, sufficiently identifies the parties and the transaction to satisfy the rule of pleading.
2. PRACTICE — WITNESSES. — That one of the two prosecuting witnesses named on the back of the indictment has no real existence does not invalidate the indictment.
3. —— EVIDENCE — PRIVILEGED COMMUNICATIONS. — Statements made in a consultation with counsel while seeking legal advice as to a prospective violation of the law, are not privileged, and the attorney may be compelled to testify with reference thereto.
4. CONSTITUTIONAL LAW. — The statutory provision as to obtaining money under false pretences is valid.
5. PRACTICE. — Objections that the prosecuting attorney was unfair in his closing address to the jury will not be considered on appeal unless objection thereto was made at the trial.

APPEAL from the St. Louis Criminal Court, VAN WAGONER, J.

Affirmed.

L. B. VALIANT, for the appellant: The indictment charges no crime; it does not sufficiently inform the defendant of the nature of the offense of which he is accused. It is an attempt at an indictment under section 1561, Revised Statutes 1879, but complies neither with the rules of criminal pleading at common law nor the requirements of that statute. — *The State* v. *Helm*, 6 Mo. 263; *The State* v. *Ross*, 25 Mo. 426; *The State* v. *Evers*, 49 Mo. 542. If it were permitted, in the use of this statutory form, to omit the names of the persons attempted to be defrauded on the ground that they were unknown, then the indictment should state that the

names were unknown; and that is an issuable fact so important that, if untrue, the prosecution must fail at the trial. — Archb. Crim. Pl. & Pr. 245, *et seq.;* Whart. Cr. Law (5th ed.), sects. 250, 251; 1 Bishop's Cr. Proc., (1st ed.) sect. 297. In all the cases in which indictments have been held to be sufficient under this statute, the names of the persons alleged to have been defrauded are given. — *Morton* v. *The People*, 47 Ill. 468; *The State* v. *Fencher*, 71 Mo. 460; *The State* v. *Porter*, 75 Mo. 171; *The State* v. *Norton*, 76 Mo. 180. The statute requires that "when an indictment is found by the grand jury the names of all the material witnesses must be indorsed on the indictment." — Rev. Stats. 1879, sect. 1802, p. 304. Communications between attorney and client are privileged. — *Cross* v. *Riggin*, 50 Mo. 335.

THOMAS B. HARVEY, JOSEPH G. LODGE, WILLIAM H. BLISS, and HENRY T. KENT, for the respondent: The indictment is sufficient. — *The State* v. *Fancher*, 71 Mo. 460; *The State* v. *Williams*, 77 Mo. 310. The purpose of requiring the name, whether of the defendant or of a third person, is identification. — 1 Bish. Cr. Proc. 677; 7 Ired. 27. In stating intent to defraud, it is sufficient to describe the party intended to be defrauded with reasonable certainty. — 2 Russ. on Cr. 367; *Lowell's Case*, 2 East's P. C. 990, sect. 60; *Noakes* v. *The People*, 25 N. Y. 386; *Fisher* v. *The State*, 4 N. J. L. 169; *Vandermark* v. *The People*, 47 Ill. 122; *The State* v. *Black*, 31 Texas, 560. Communications between attorney and client are not privileged when the client is seeking advice as to prospective infractions of the law. — Weeks on Attorneys, sect. 166; Whart. Cr. Ev., sect. 504; *Gartside* v. *Outram*, 26 L. J. Ch. 113, 114.

LEWIS, P. J., delivered the opinion of the court.

The case, with a few unimportant omissions, is fairly stated by the appellant as follows :—

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"The indictment charges that the defendant, on the 13th of September, 1883, in the city of St. Louis, 'did, with intent, then and there, to feloniously cheat and defraud, unlawfully and feloniously attempt to obtain from certain persons, firms, and corporations, then and there composing a voluntary association known as the Brewers' Association of St. Louis and East St. Louis, a more particular description of which said persons, firms, and corporations, and of said association, is to the jurors aforesaid unknown, by means and by use of a certain trick and deception, and by means and by use of certain false and fraudulent representations, statements, and pretences, a large sum of money; that is to say: the sum of two thousand dollars, then and there the money and property of said association, contrary," etc.

Indorsed: "A true bill: Thomas Richeson, foreman. Witnesses: Jas. C. McGinnis, Robt. Wilson."

Defendant demurred to the indictment on the grounds: —

"1. That said indictment does not state facts sufficient to constitute a crime, or charge the defendant with the commission of acts which constitute a crime against the laws of this state, in this, to wit: said indictment does not set forth the act or acts constituting the alleged trick and deception, and does not state in what the alleged fraud and fraudulent representations, statements and pretences consisted, or of what acts or conduct the defendant is charged, as constituting such alleged trick and deception, false and fraudulent representations, statements, and pretences; neither does it state the name or names of the person, or persons, or corporations defrauded, or attempted to be defrauded; neither does it state that the name or names of such person, or persons and corporations, defrauded, or attempted to be defrauded, or that the person, or persons and corporations, defrauded, or attempted to be defrauded, were unknown to the grand jury."

"2. The indictment neither states facts descriptive of the offence, as the rules of the common law and general crim-

inal pleading require, nor does it give the names of the persons defrauded, as the form prescribed by the statute requires.

"The demurrer was overruled and afterwards the de-defendant filed a plea in abatement, as follows: —

"Now comes the defendant, and for his plea in abatement herein, says that he ought not to be required to answer said indictment, because, he says, that in relation thereto, the state has practiced and is practicing towards him a trick and deception, in this, to wit: that, instead of indorsing on said indictment the names of all the material witnesses, as the law directs, the state has indorsed thereon a fictitious name, to wit: Robert Wilson, in lieu of the real name of a witness whose name is to this defendant unknown, with the intent to deceive and mislead the defendant, and deprive him of the fair notice, which the statute in such case made and provided, requires to be given him, and this he is ready to verify. Wherefore, defendant prays judgment if he should be required to further answer said indictment."

3. "This plea was duly verified by the affidavit of the defendant.

"The state demurred to the plea and the court sustained the demurrer.

"On the trial, the state introduced evidence tending to prove that in August, 1883, when there was great public interest shown on the subject of enforcing the Sunday feature of the dramshop law of 1883, the question arose as to whether or not the act of 1883 repealed the act of 1857, which authorizes cities, in the county of St. Louis, to license beer saloons to keep open on Sunday, when thereto authorized by a vote of the people of the city. That this was a question in which the Brewers' Association, which was a voluntary association, composed of all the brewers but one in the city, was greatly interested, and members of the association were being prosecuted in the court of

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criminal correction for selling beer on Sunday, and Mr. J. C. McGinnis was their attorney. That, in this emergency, defendant sent for one Zach. J. Mitchell, an attorney who was in the employ of the Saloon-keepers' Association, of St. Louis County, and gave Mitchell to understand that he, defendant, was in the employ of the Brewers' Association, and desired to consult with him, Mitchell, professionally on this question. The result was, Mitchell unfolded to defendant a plan by which the question could quickly be carried to the supreme court, which was this, to-wit: a proposition was already on foot in the city of St. Ferdinand, or Florissant, to petition the city council of that city to order an election under the provisions of the act of 1857; if the council should order the election, an application to the supreme court would lie for a *quo warranto;* if the council should refuse to order the election, an application for a *mandamus* would lie to compel them to do so; thus the naked question of the validity of the act of 1857 could be brought directly to the supreme court. Mitchell was willing to undertake the suit for a fee of $1,000; McChesney was to submit the matter to the gentlemen whom he professed to represent (but whose names he did not give, but who, he gave Mitchell to understand, were connected with the Brewers' Association, but did not wish to be known), and ascertain if they would be willing to incur the expense, and employ counsel to carry this question in this way to the supreme court. That this was a subject of discussion between defendant and Mitchell, at intervals, for several weeks, but nothing was settled, and in the meantime the test case in the court of criminal correction was decided in favor of the brewers; that after that decision defendant went to the attorney for the brewers, McGinnis, and told him that a movement was on foot in the city of St. Ferdinand, or Florissant, by the prohibitionists, to petition the city council to order an election under this law of 1857, which the council was to refuse, and then a *mandamus* was

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to be applied for, which would bring the question to the supreme court; and that defendant suggested that the movement ought to be stopped, and said that he had been out to Florissant and seen 'those people out there' (by which expression the witness understood he meant the city council of St. Ferdinand, although he did not say who he meant), and that the thing could be stopped for $2,000, which he thought the brewers ought to pay; that of this $2,000 part was to be paid to 'those people out there,' and part to certain parties, not named, in the city of St. Louis; that McGinnis refused to submit the proposition to the Brewers' Association, but, at defendant's request gave him the names of the officers of the Brewers' Association, saying, that if he desired to do so, he could submit the proposition to them himself. McGinnis did not submit the proposition to the Brewers' Association, but mentioned it to some of the members of the association, and afterwards was summoned before the grand jury and gave his evidence in this case.

"That on the 29th of September, 1883, a petition of citizens was presented to the city council of St. Ferdinand, for an election to be held under the law of 1857, which was granted by the council; the election was ordered and held, 15th of October, 1883, and resulted in favor of keeping the beer saloons open on Sunday."

To this statement should be added some other facts which the testimony on the part of the state tended to prove, viz.: That there had never been any communication whatever between the defendant and the city authorities, or any of them, of the city of St. Ferdinand having any reference to the subject-matter of his several conversations with McGinnis and Mitchell, nor had those city officers ever heard of or discussed any proposition for so shaping their action in relation to the act of 1857, as to make a case for determination by the supreme court. That the defendant, in one of his conversations with McGinnis, promised to go

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out to St. Ferdinand on the following day and ascertain with more certainty what was on foot in the premises, and, in a subsequent conversation with the same witness, told him that he had visited those city officers, and learned from them that the contemplated proceedings would be stopped for a consideration of $2,000, to be paid to them and others, through the defendant. That the defendant had no direct communication with the Brewers' Association or its officers, and was never authorized to represent them in any way.

The defendant testified in his own behalf. As to this it is sufficient to say that his account of the matter, if true, was consistent with the most upright intentions on his part, and would have established a complete defence against any criminal charge, as exhibited in the indictment. But in just so far as his story, and the particulars detailed by him, tended in this direction, including his account of conversations with the witness — they were flatly contradicted by the witnesses on the part of the prosecution. The jury could not possibly believe both sides of this conflicting testimony. It is manifest from the verdict that they believed the state's witnesses, and did not believe the defendant. It is too well settled for discussion here, that, in such cases, an appellate court has no authority to interfere with the verdict. The jury found the defendant guilty, as charged, and assessed his punishment at two years' confinement in the penitentiary. We are asked to hold that the demurrer to the indictment should have been sustained. It seems to be admitted that under Revised Statutes (sect. 1561), and its interpretation in *The State* v. *Fancher* (71 Mo. 460), the description of the offence is sufficient, and would uphold the indictment but for the omission of the name or names of the intended victim or victims of the false pretences and representations. We are unable to perceive that there is any fatal omission in this particular. The indictment specifies "certain persons, firms, and corporations, then and there composing a

voluntary association known as the Brewers' Association of St. Louis and East St. Louis, a more particular description of said persons, firms, and corporations and of said association, is to the jurors aforesaid unknown," etc. "The rigid rule of the common law is not required in naming an injured party whose name is used in indictments, as in the case of defendants." *The State* v. *Black*, 31 Texas, 560; *The State* v. *Seeley*, 30 Ark. 162; *The State* v. *Brite*, 73. N. C. 26. In *The State* v. *Angel* (7 Ired. 27), it is explained that "the object of setting out the name of the person injured is to identify the particular fact or transaction on which the indictment has been founded, so that the accused may have the benefit of an acquittal or conviction if accused a second time. The name is generally required as the best mode of describing the person, but he may be described otherwise, as by his calling or the like; if he be identified thereby as the individual, and distinguished from all others, and if the name be not known, the fact may be stated as an excuse for omitting it altogether." It is true that in the Missouri cases and others cited for the appellant the full names of the persons injured are given, and this fact is generally referred to as satisfying the demand for such an identification of the act constituting the crime, as will protect the accused against another prosecution for the same offense. But we do not find it any where declared that the name is the essential and only admissible means to be used for such an identification. The descriptive term "Brewers' Association of St. Louis and East St. Louis," is declared to be that by which certain firms, persons, and corporations are known in their collective capacity. If they are so known, as to which there is no dispute, there can be no possible difficulty in identifying the present charge with any future accusation of a like nature, affecting the same persons, whether described by the name of the association, or the baptismal and surnames of the individuals composing it. We think there is here a satisfactory compliance with all

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the requirements of criminal pleading in this particular, and the defendant has no substantial ground of complaint. The defendant insists that the demurrer to his plea in abatement ought to have been overruled. The statute upon which he relies (Rev. Stats., sect. 1802) reads thus: "When an indictment is found by the grand jury the names of all the material witnesses must be indorsed upon the indictment; other witnesses may be subpœnaed or sworn by the state, but no continuance shall be granted to the state on account of the absence of any witness whose name is not thus indorsed on the indictment, unless upon the affidavit of the prosecuting attorney showing good cause for such continuance." The provision is clearly directory only, and, in undertaking to define the specific consequences of a failure to obey it as to any witness, it compels an interpretation which will attach no more serious consequences to such a failure than those which are so defined. The statute is not to be understood as invalidating an indictment because the names of all the witnesses may not be indorsed upon it. This distinctly appears from the express permission given to examine witnesses whose names are not so indorsed. With quite as little reason could it be construed as compelling an examination by the state of every witness whose name may appear upon the indictment. If these propositions be correct, how can it be supposed that a defendant may be injured by the state's omission to examine any one or more of such witnesses? And how, in such an event, can he be injured any more by the fact that the witness whose name appears to be indorsed on the indictment has no real existence?

Whatever may have been the motives of the prosecuting officer in indorsing a fictitious name, if such was the fact, upon the indictment, we are wholly at a loss to understand in what way the rights of the defendant could possibly be prejudiced thereby. We think the demurrer to the plea in abatement was properly sustained.

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It is objected that the court erred in permitting Mr. Mitchell to testify against the defendant's objections, in view of the relations which existed between the two, as attorney and client. The question of fact, as to the existence of such relations was decided by the court adversely to the defendant. We fail to perceive that this conclusion was not warranted by the evidence. The rule exists for the protection of litigants, actual or intending, who find it necessary to make full and confidential revelations to counsel learned in the law, in order to an assured ascertainment of their legal rights. It does not clearly appear that the defendant ever pretended to any thing of this sort in his interviews with Mitchell. He professed to be talking not for himself, but for the Brewers' Association. It may be claimed that a party who consults an attorney through an agent is entitled to the same protection against disclosures that would be assured to him if he consulted the attorney in person. But the Brewers' Association here claimed no such protection, and the defendant could not claim it for them. There is, however, another rule which would seem to justify the action of the trial court. "The privilege does not shield parties seeking for advice as to prospective * * * infractions of the law." Whart. Cr. Ev., sect. 504. This rule, it is true, is usually applied only where the party dicloses to the attorney his criminal purpose. But it is held that while a mere charge of criminal intent is insufficient to let in the communications, the court may properly look into the circumstances of each case, with a view to determining the *bona fides* of the alleged consultation with a professional adviser. *Crisp* v. *Platel*, 8 Beav. 62. The whole tendency of the state's testimony in the present case, was to the general effect that the defendant's consultations with Mitchell were held with a view of expediting his designs in the matter charged in the indictment. Under all the circumstances we can not say that the trial court abused its discretion or denied any right of the defendant's

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in admitting the testimony objected to in this connection.

The defendant claims that the court erroneously failed to instruct the jury what acts were necessary or sufficient to constitute a false pretence within the meaning of the law. The statute, after defining the offence under consideration, says: "In every indictment under this section it shall be deemed and held a sufficient description of the offence to charge that the accused did on ———, unlawfully and feloniously obtain or attempt to obtain (as the case may be) from A B (here insert the name of the person defrauded) his or her money or property by means and by use of a cheat, or fraud, or trick, or deception, or false and fraudulent representation or statement, or false pretence, or confidence game, or false and bogus check or instrument, or coin or metal, as the case may be, contrary to the form of the statutes," etc. Rev. Stats., sect. 1561. The constitutionality of this provision has been sustained both in this state and in Illinois, whence it was copied into our Revised Statutes, and can not now be questioned as depriving the accused of all the information to which he is entitled or any part thereof touching the nature of the offence charged against him. *The State* v. *Fancher*, 71 Mo. 460; *Morton* v. *The People*, 47 Ill. 486. We are not aware of any rule which makes it necessary to define more fully for the comprehension of the jury, the nature of the offence or of the means by which it may be perpetrated. The terms "false pretence" and "false representation" have no technical meaning different from that of their common daily acceptation, wherever they are used by persons who speak our language. No instruction from the court could present their meaning any more clearly than it must be perceived by men of sufficient intelligence to occupy a jury-box, in the import of the words themselves. There was no error on this point. The court instructed: "Defendant is a competent witness in his own behalf in the trial of this case, but the

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fact that he is the defendant on trial, and the interest he has at stake may be taken into consideration by the jury for the purpose of affecting his credibility." There was no error in this instruction. It simply gave practical and proper effect to the statute (Rev. Stats., sect. 1918), which provides that "no person shall be incompetent to testify as a witness in any criminal cause or prosecution by reason of being the person on trial or examination; or by reason of being the husband or wife of the accused, but any such facts may be shown for the purpose of affecting the credibility of such witness." It could not have been wrong to inform the jury of the effect of a statutory provision especially applicable to the matter in hand and expressly adapted to their guidance. This was not commenting on the weight of particular facts in evidence, as in the cases to which we are referred by the appellant.

The defendant claims that counsel for the prosecution, in his closing argument to the jury, used language which was unfair and prejudicial to the rights of the accused. It does not appear from the record that any objection was made at the time, or that the attention of the trial court was in any way called to the matter before the filing of the motion for a new trial. We have again and again declared that, in such a state of record, the objection can not be considered in this court. We may add, however, that in the report of the remarks complained of, we find nothing which violates any rule of inhibition in that relation, with which we are acquainted. *Roeder* v. *Studt*, 12 Mo. App. 566.

We have carefully read all the testimony in this very voluminous record, and are unable to see how the jury could have reached a different conclusion, if they gave any credence to the evidence introduced on the part of the state. Whatever might be our own opinion of the credibility due to the defendant's account of the transactions and doings referred to, we could not give effect thereto by usurping the province of the jury or by disturbing their verdict with-

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out some error of law apparent in the record. We find no such error and must therefore affirm the judgment. All the judges concur.

J. B. JOHNSON, Respondent, v. ISAAC M. MASON, Appellant.

November 25, 1884.

1. **REPLEVIN — AFFIDAVIT. — The affidavit required by statute, in replevin, may be made by another on behalf of the plaintiff.**
2. **OFFICERS — CUSTODIA LEGIS — GARNISHMENT. — Money deposited with the sheriff by the defendant in replevin to enable him to retain the property, is not in *custodia legis*, and is subject to garnishment.**

APPEAL from the St. Louis Circuit Court, LUBKE, J. *Affirmed.*

KRUM & JONAS, for the appellant.

JOHN WICKHAM, for the respondent: The money deposted with the sheriff, not having been placed there *virtute officii*, was not in *custodia legis*, but was subject to garnishment. — *Lightner* v. *Steinagel*, 33 Ill. 510–517; *Pierce* v. *Carleton*, 12 Ill. 358; *Wheeler* v. *Smith*, 11 Barb. 348; *King* v. *Moore*, 6 Ala. 160.

LEWIS, P. J., delivered the opinion of the court.

On January 30, 1882, Anak A. Rowland sued William J. Berkley in repleyin for the recovery of certain personal property of the alleged value of $800. There was an order of delivery, to which the sheriff, the present defendant, made return that the defendant in replevin had deposited with him the sum of $400 to indemnify the plaintiff, and was therefore allowed to retain the property — the said sum of $400 to be held "subject to the order of court." The defendant also gave a forthcoming bond to the sheriff in the penal sum of $750, with Bowman and Robertson as his sure-

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ties. Rowland afterwards moved against the sheriff as for a contempt, in failing to execute the order of delivery. In the attorney's affidavit filed with this motion, it is alleged that the replevin plaintiff had given a bond under Revised Statutes (sect. 3846), which was approved by the sheriff, but nothing of this appears elsewhere in the present record. The sheriff, having answered that the affidavit in replevin was made by a person other than the plaintiff, and that the defendant had given an indemnifying bond, together with other indemnity, was discharged from the rule against him. On March 19, 1883, an execution was issued on the present plaintiff's judgment against Berkley for $362.03, and placed in the hands of the coroner, who summoned the present defendant, sheriff, as garnishee. The garnishee answered, reciting the replevin suit and its continuing pendency, and denying any indebtedness or liability on account of the execution defendant. On November 5, 1883, judgment was rendered in the replevin suit against Berkley and his sureties. By an entry of record, the replevin plaintiff afterwards released the sureties and elected to pursue Berkley's property only.

On December 20, 1883, an order of the circuit court directed the garnishee to pay over to the present plaintiff the sum of $400, less $15, allowed him for his answer. A motion for a new trial was overruled and, on March 17th, 1884, a final judgment was rendered in favor of the plaintiff and against the garnishee, for $385 and costs.

We are not authorized to consider the attorney's affidavit in the contempt proceeding, as shown in this record, that a bond was given by the plaintiff in replevin. If there was such a bond, neither the instrument, nor its legal effect, is here authenticated as the law requires. So regarding the effect of the present record, there appears to have been a singular disregard, in the replevin suit, of plain statutory requirements. The Revised Statutes provide:

"Sect. 3846. The sheriff shall not receive or take such

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property until the plaintiff shall deliver to him a bond executed by two or more sufficient securities approved by the sheriff, to the effect that they are bound to the defendant in double the value of the property stated in the affidavit, for the prosecution of the action with effect and without delay, for the return of the property to the defendant, if return thereof be adjudged, and in default ef such delivery, for the payment of the assessed value of such property, and for the payment of all damages for the taking and detention thereof, and for all costs which may accrue in the action.

"Sect. 3847. Upon such bond being executed as aforesaid, the sheriff shall receive the property, or, if the same be not delivered, shall take the property and deliver it to the plaintiff, unless, before such delivery to the plaintiff, the defendant shall, with two or more sufficient securities, to be approved by the sheriff, execute a bond to the plaintiff, etc.

"Sect. 3849. If the plaintiff shall state in the affidavit made by him, as provided by section three thousand eight hundred and forty-four, that the property was wrongfully taken, and that his right of action accrued within one year, the defendant shall not be entitled to retain such property by giving bond, as provided by section three thousand eight hundred and forty-seven, but the same shall be delivered to the plaintiff, upon his giving the bond required."

The affidavit filed for the plaintiff in the replevin suit was made in his behalf by C. C. Logan, and was, in this particular, expressly authorized by Revised Statutes (sect. 3844). It contained the statutory averments, together with others, that "said property was wrongfully taken, and that said Rowland's right of action accrued within one year." If the statute sections above copied mean anything, the sheriff was never authorized or required to take the property from the defendant, or to deliver it to the plaintiff, since it does not sufficiently appear that the plaintiff gave any bond. Nor were the conditions such as to make it proper for the sheriff to leave the property with the defendant, upon his indemni-

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fying bond, or otherwise, according to section 3849. It can not make any difference that the affidavit was made by a person other than the plaintiff. Nothing appears to show that to be the policy indicated in section 3844, which gives to a plaintiff in replevin all the benefits of the action, upon an affidavit made by another in his behalf, which he would secure from an affidavit made by himself. Section 3849 expressly refers to the plaintiff's affidavit, "as provided by section three thousand eight hundred and forty-four." It would be a strained interpretation, manifestly repugnant to the legislative purpose, to limit this provision to the case of a plaintiff who makes the affidavit in person, instead of availing himself of the permission given to have it made by another in his behalf.

It results, therefore, that the sheriff's proceedings were extra-official, and not authorized by any provisions of the law governing the case. He incurred no official responsibility, as to either the plaintiff or the defendant, with respect to the $400 placed in his hands, even if a replevin bond had in fact been given by the plaintiff. No law of this state authorizes a sheriff, in his official capacity, to deliver replevined property to the defendant upon a deposit of money. Money so deposited is not in *custodia legis*, but is held by the sheriff as a mere private bailee. Whether the release by the plaintiff of the sureties in the forthcoming bond would have operated a discharge of the sheriff, in the event of his having assumed an official responsibility, need not be here inquired. Upon the facts shown by this record, the sum of $400 in the present defendant's hands was liable to garnishment under an execution against Berkley, and we can find no error in the circuit court's judgment to that effect. With the concurrence of all the judges, the judgment is affirmed.

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I. M. MASON, TRUSTEE, Plaintiff in Error, *v.* BANK OF COMMERCE, Defendant in Error.

16	275
39	197
16	275
43	382
44	322
16	275
48	342
16	275
61	25
16	275
d150	m576
16	275
96	*651

November 25, 1884.

1. TRUSTEES — TRANSIENT SECURITIES. — A trustee who is required by the instrument which creates the trust to hold the capital for the remaindermen, has an implied power to convert a transient security into money for the purpose of a permanent investment.
2. —— A promissory note which will mature in less than one year is a transient security.
3. —— A purchaser in good faith of such a note from the trustee takes the title thereto, and is not bound by the acts of the trustee with reference to the purchase money paid.

ERROR to the St. Louis Circuit Court, THAYER, J.

Affirmed.

KRUM & JONAS, for the plaintiff in error: Under the circumstances given in evidence by Wherry, the note was taken out of the category of ordinary commercial paper. — *Renshaw* v. *Wills*, 38 Mo. 201; *Third National Bank* v. *Lange*, 51 Md. 138; *Shaw* v. *Spencer*, 100 Mass. 382; *Duncan* v. *Jaudon*, 15 Wall. 173–175. If a man knows that the legal estate is in a third person at the time he purchases, he is bound to notice the terms and extent of the trust. — 2 Sudg. on Vend. 542; *Christmas* v. *Mitchell*, 3 Ir. Ch. 535; *Hall* v. *Smith*, 14 Ves. jr. 432; *The United States* v. *Sturges*, 1 Paine, 535; *Renshaw* v. *Wills*, 38 Mo. 201.

JAMES TAUSSIG and CHARLES S. TAUSSIG, for the defendant in error: One who purchases from a trustee with notice that he is buying trust property acquires a perfect title, if by the instrument creating the trust the trustee has the power to sell or vary securities. — Perry on Tr., sect. 225; *Ashton* v. *Atlantic Bank*, 3 Allen, 217; *Creighton* v. *Cringle*, 3 S. C. 77; *Dillaye* v. *Com. Bank*, 57 N. Y. 354; *Fountain* v. *Anderson*, 33 Ga. 373; *Goodwin* v. *Amer.*

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Nat. Bank, 48 Conn. 564; *Shaw* v. *Spencer*, 100 Mass. at pp. 389 and 391. And such a purchaser, knowing that he is buying trust property, is put upon no inquiry except to ascertain whether the power to sell or vary securities exists. He is not responsible for misapplication of the purchase-money.—Perry on Tr., sects. 225, 814; *Ashton* v. *Atlantic Bank*, 3 Allen, 217; *Shaw* v. *Spencer*, 100 Mass. 391, 392; *Goodwin* v. *Amer. Nat. Bank*, 48 Conn. 564.

Thompson, J., delivered the opinion of the court.

Wherry was trustee under Julia G. Cabanne's will. The nature of the trust was expressed in the following language: "First, to permit my said son Julius to use and enjoy the said property and take the rents, issues and profits thereof as long as he shall live; and, second, if he die, and his wife, Ann Stella, survives him, to permit the said Ann Stella to use and enjoy the said property, and to take the rents, issues and profits thereof as long as she shall live and remain the widow of the said Julius; and, third, after the death of the said Julius, and the death or marriage of the said Ann Stella, to hold the same in trust for such child or children as may be then living, and the survivor or survivors of them until the youngest of such children shall be twenty-one years of age or be married, and shall then convey the absolute title to such child or children.

"And if after the death of the said Julius, and the death or marriage of said Ann Stella, there be no child of said Julius, or if his children all die before becoming twenty-one years old or being married, then my will is, and I devise and bequeath accordingly, that the share hereby set apart for the said Julius pass to and be vested in my own right heirs in the same manner and proportions, as if it descended from me by direct inheritance."

As such trustee Wherry held an unmatured negotiable promissory note, made payable to certain persons and by them indorsed in blank. He went to the president of the

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Bank of Commerce and asked to have the noted discounted, saying: "This note I hold as trustee, and desire to accommodate the beneficiaries under the trust by making a loan, and I want to negotiate the note." The president of the bank, having made some inquiries to satisfy himself as to the goodness of the parties to the note, discounted it for him. The proceeds were paid to him by means of a cashier's check, which was made payable to him as trustee, and which he presented to the paying teller, who handed to him the money. The note was paid to the bank at its maturity. The money which the bank paid to Wherry for the note was misappropriated by him, and lost in the general wreck of his business. He subsequently resigned his trust; the plaintiff was appointed trustee in his stead, and has brought this action against the Bank of Commerce to recover the money which it received from the parties to the note in payment of it at its maturity. Upon evidence substantially as above stated, the circuit court gave an instruction to the effect that the plaintiff could not recover.

The action necessarily proceeds upon the idea that the Bank of Commerce received a portion of the trust funds which were in the hands of Wherry, under such circumstances that the law will allow it to be recovered for the benefit of those interested therein. If this is so, it is plain from the above statement, that it must be in consequence of some rule of law under which parties who deal with trustees proceed at every step at their peril, and under which parties who have dealt with trustees in entire good faith are liable to suffer the plainest injustice.

We hold the following propositions to be well settled: —

1. That the holder of an unmatured negotiable promissory note indorsed in blank is *prima facie* the owner thereof with full power to dispose of the same; and that whoever purchases it from him for value gets a good title thereto, in the absence of knowledge of circumstances affecting the title of such holder, provided such purchaser act in good

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faith. It is not sufficient to destroy his title that there were circumstances sufficient to put a prudent man upon inquiry, or that he may have been negligent in failing to avail himself of his means of knowledge. The test of his liability is not negligence or diligence, but it is good faith or bad faith; although the fact of negligence may, under circumstances, be evidence tending to show bad faith. *Goodman* v. *Harvey*, 4 Ad. & El. 870; *Swift* v. *Tyson*, 16 Pet. 1; *Goodman* v. *Simons*, 20 How. 343; *Hamilton* v. *Marks*, 63 Mo. 178; *Edwards* v. *Thomas*, 66 Mo. 483.

2. But where the person to whom such a note is offered for sale or discount has distinct notice at the time that the holder does not own it in his own right, but as trustee, he is bound at his peril to inquire whether the instrument creating the trust has conferred power upon the holder so to dispose of it. In the case of executors, administrators, and guardians, the trust is so far governed by law that such trustees have, *prima facie*, the power to sell personal property belonging to the trust estate. A person may, therefore, purchase such property of such trustees under the assurance that the law will protect him in his title, provided he act in good faith. *Field* v. *Schieffeling*, 7 Johns. Ch. 160; *Fountain* v. *Anderson*, 33 Ga. 372; *Goodwin* v. *American National Bank*, 48 Conn. 564; *Bayard* v. *Farmers', etc., Bank*, 52 Pa. St. 235; *Lowry* v. *Commercial, etc., Bank*, Taney's Dec. 333.

But the powers of a trustee under a will are such as are conferred upon him by the will, and none other. He has not, *prima facie*, the power to sell personal property, or to vary securities belonging to the trust estate. Whether or not he have such power is a question the answer to which must be sought for in the terms of the will; and whoever purchases of him ordinary personal property belonging to the trust estate, or negotiable paper, with knowledge that he holds it as trustee, must make this inquiry at his peril. *Loring* v. *Salisbury Mills*, 125 Mass. 138; *Maywood* v.

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Railroad Bank, 5 Rich. Law, 379; *Bayard* v. *Farmers,' etc., Bank*, 52 Pa. St. 237; *Third National Bank* v. *Lange*, 51 Md. 138.

3. But if he make this inquiry, and find that such a power exists in the trustee, or if, having notice of the trust, he assumes the risk of its existence without inquiry, and thereupon purchase the property in good faith, he will get a good title if the power in fact does exist. He is not bound to see to the application which the trustee may make of the purchase-money. *Goodwin* v. *American National Bank*, 48 Conn. 564; *Shaw* v. *Spencer*, 100 Mass. 391; *Ashton* v. *Atlantic Bank*, 3 Allen, 217; *Fountain* v. *Anderson*, 33 Ga. 337. The last proposition is declared by statute in this state. Rev. Stats., sect. 3937.

4. Where, by the terms of an instrument creating a trust, the trustee is to pay the income of the trust property to a life tenant and hold the capital for a remainderman, he has an implied power to sell perishable property, and to convert into money transient securities, for the purpose of making permanent investments. *Howe* v. *Earl of Dartmouth*, 7 Ves. 137, 151; *Litchfield* v. *Baker*, 2 Beav. 481; *Pickering* v. *Pickering*, 4 Myl. & Cr. 298; *Bruce* v. *Dixon*, 10 Sim. 638; *Cairns* v. *Chaubert*, 9 Paige, 163; *Kealey* v. *Tappan*, 45 N. H. 243.

Applying these principles to the case in judgment, we have no doubt that, by the terms of Julia G. Cabanne's will, Wherry had impliedly the power to convert the note in question into money for the purposes of the trust. The trust was, indeed, larger in its terms than the trusts in the case of which the English courts of chancery, and the American courts following them, have implied such power; for here, the trustee was not merely to permit Julius Cabanne and his wife to have the rents, issues, and profits of the trust property, but he was to permit them to enjoy the property itself.

A promissory note having less than a year to run is mani-

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festly a transient security, such as a trustee, under the rule above stated, ought to convert into money for the purpose of a permanent investment. Trustees, in the course of business, are liable to receive negotiable promissory notes from the lessees of real property, and from other persons having dealings with the trust estate. Such notes may, *prima facie*, as well form a part of the income as a part of the capital of the estate; and the trustee may, in the proper discharge of his trust, under the terms of such an instrument as the will here in question, have occasion to convert such transient securities into money in order that it may be handed over to the beneficiaries in the trust.

Since, then, Wherry had the power to convert the note in question into money, the only remaining inquiry can be whether, in purchasing it from him by way of discount, the Bank of Commerce acted in good faith. Upon this point there is not a particle of doubt. There were no circumstances developed by the evidence which would authorize the court to put such a question to the jury. There was nothing in the statement of Wherry to the president of the bank that he wanted to use the money "to accommodate the beneficiaries under the trust by making a loan," which would raise a suspicion that a breach of trust was intended. It might well be an accommodation to the beneficiaries in the trust to convert the note into money and lend it to them upon such security as a trustee is authorized to take. Certainly, there is nothing in this statement that would convey an intimation, or even a suspicion, to a prudent business man that the trustee intended to convert to his own use the money so received. The statement was made by Wherry for the very purpose of warding off such a suspicion, because no bank would, for the sake of getting the discount usually reserved upon commercial paper, run any risk of its title in case of a note as large as this was, it being for the sum of $2,666.66. We are, therefore, clearly of opinion that the circuit court was right in giving the instruction that the plaintiff could not recover.

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In reaching this conclusion, we have not overlooked the cases cited to us by the learned counsel for the plaintiff. In *Renshaw* v. *Wills* (38 Mo. 201), a note secured by a deed of trust had been given to a sheriff in payment of purchase-money at a partition sale. The note expressed on its face that it was given to him as sheriff. The sheriff sold it before maturity. The court held that the purchaser did not get a good title. He had notice from the terms of the note itself of the fiduciary character in which the sheriff held it. The reasoning of the court is not very clear; but the decision may be supported upon the ground that a sheriff has presumptively no power to sell a note thus held by him, and that good faith requires that a person to whom such a note is offered by a sheriff for sale should satisfy himself concerning the power of the latter to sell it. If, however, this decision goes against the conclusion at which we have arrived in this case, it is sufficient for us to say that, in so far as it places the liability of the purchaser of a negotiable note upon the duty of making inquiry, it is overruled by the subsequent cases of *Hamilton* v. *Marks* (63 Mo. 178), and *Edwards* v. *Thomas*, (66 Mo. 483). The case of the *Third National Bank* v. *Lange* (51 Md. 138), proceeded upon the ground that the bank purchasing the note had knowledge from the terms of the note that the holder was a trustee; that it was hence bound to make inquiry as to his power to sell the same. Having failed to do this, and it having turned out that he was disposing of it in fraud of his trust, it was held that the bank did not get a good title. We do not understand from the decision of the court whether the trustee had or had not in fact the power to sell the note. Assuming that he had such power, if the Maryland court intended to hold further that the purchaser was bound to inquire into the purposes for which he was offering the note for sale, and to satisfy himself that those purposes were lawful and within the terms of the trust, we feel bound to say that, while we have great respect for the

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court pronouncing the decision, it is contrary to the rule of the two cases above cited from our supreme court, and it does not meet with our approval. Our decisions proceed upon the ground that public policy requires that those who purchase before maturity negotiable securities, which enter so largely into the movements of commerce, should not lose their title because they have not suspected fraud or instituted inquiries where all seemed fair, honest, and conformable to business usage.

The judgment of the circuit court is affirmed. All the judges concur.

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64 414
16 282
90 240

STATE OF MISSOURI, Respondent, *v.* J. L. FITZPORTER, Appellant.

November 25, 1884.

1. CRIMINAL LAW — NEW TRIAL — NEWLY DISCOVERED EVIDENCE. — In a criminal case, a motion for a new trial on the ground of newly discovered evidence, which evidence would not tend to show the innocence of the accused, is properly overruled.
2. —— VENUE — PRACTICE. — The venue being laid at St. Louis, proof that the offence was committed on a certain street well known to be a street in St. Louis, is sufficient to support a finding that the offence was committed at St. Louis.
3. —— In a criminal action for an attempt to commit an offence, the court will not, on appeal, reverse the judgment on the ground that the offence was actually committed, unless the evidence thereof is clear and unequivocal.
4. —— STIPULATION. — An appellate court will not enter judgment in a criminal case upon a stipulation not signed by the proper officer of the state.

APPEAL from the St. Louis Court of Criminal Correction, NOONAN, J.

Affirmed.

JAMES M. LORING, for the appellant.

J. R. CLAIBORNE, for the respondent.

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THOMPSON, J., delivered the opinion of the court.

The defendant was indicted under section 1268, Revised Statutes, for using an instrument, the name of which was to the grand jurors unknown, upon the body of Annie Fanger, she being a pregnant woman, with intent to commit an abortion. He was found guilty, and his punishment was assessed at a fine of $500.

The testimony for the state tended to show that the defendant had, at the request of the prosecutrix, Annie Fanger, in consideration of divers sums of money by her paid to him, amounting to $95 in all, committed an abortion upon her by the use of a steel instrument. Testimony for the defendant tended to show that he had neither committed nor attempted to commit an abortion upon her, but that he had at her request treated her for a disease of the womb, and that the instruments which he had used upon her were not instruments which are used in committing abortions, but were instruments which are used in examining and treating women who are afflicted with disease of the womb. The defendant also introduced testimony tending to show that the prosecutrix had demanded of him the repayment of the money which she had paid him for thus treating her, claiming that his treatment had done her no good, and that, after the finding of this indictment, she had brought an action before a justice of the peace, alleging in her complaint that he had obtained this sum from her "by means of fraudulent representations and devices." At the trial the prosecutrix, testifying as a witness for the state, admitted that she could not say but that she was still *enceinte*. The trial took place less than three months after the alleged abortion.

1. One of the grounds on which a new trial was claimed was newly discovered evidence. In support of this ground of the motion for a new trial, the defendant introduced the affidavit of Harriet Jones, who testified that, on or about December 10 or 15, of 1883, the affiant had an inter-

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view with the prosecutrix, in which the prosecutrix told affiant that she was not at all satisfied with what the defendant had done for her; that she had paid him a good sum of money, and that he had not done for her what he had agreed to do, but that she was still in a family way, and meant to have her revenge by prosecuting him criminally. Affiant stated that she had never seen the defendant until February 13, 1884, which was about a week after the trial, at which time she had informed him of this conversation with the prosecutrix. The affidavit was supported by that of the defendant, to the effect that Harriet Jones had for the first time informed him of this conversation with the prosecuturix, on February 13, 1884; and, that it was not owing to a want of diligence on his part that the knowledge did not come to him sooner.

We are clear that these affidavits did not disclose ground for a new trial. The testimony of the absent witness for appellant would not probably have changed the result. It did not, to any degree, tend to show that the defendant was not guilty of the crime charged in the indictment, namely, an attempt to commit an abortion. It rather tended to show the reverse, namely, that he had made the attempt, had received money of the prosecutrix for making it, and had not been successful. Aside from this, it was merely cumulative, and its purpose was merely to impeach the prosecutrix as a witness by showing that she had made statements contradicting those which she had made upon the witness-stand. It is well settled that newly discovered evidence of this kind is not ground for a new trial. *The State* v. *Schumacher*, 12 Mo. App. 569.

2. The indictment charged that the offence was committed in the city of St. Louis. The testimony, as preserved in the bill of exceptions, speaks of the place where the offence was committed as the office of the defendant, on Seventh and Spruce streets, without mentioning the city of St. Louis. The learned judge, in his instructions to the

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jury, omitted any distinct statement as to the venue. We nevertheless think that we ought not to reverse the judgment because of this omission. We may take judicial notice of the old and well established streets of the city of St. Louis, in which we hold our court. We know as a fact that there is in this city a street called Spruce Street, and also a street called Seventh Street, and that these streets intersect each other. The point described in the testimony is not far from the court-house where we sit, and not far from the court-house in which this trial took place. It is manifest throughout the record that the witnesses, the court, the jury, and the counsel, understood that the place spoken of was within the city of St. Louis; and we will not, especially in a case of misdemeanor, where the punishment assessed is merely a pecuniary fine, so far strain a technical point as to reverse the judgment for an omission which manifestly worked no prejudice to the defendant. *The State* v. *Ruth*, No. 2560, Mo. App.

3. A reversal is claimed on the ground that the evidence aforesaid shows, if it shows anything at all, that an abortion was actually committed; and it is claimed that this brings the case within section 1646, Revised Statutes, which provides that "no person shall be convicted of an assault with intent to commit a crime, or of any other attempt to commit any offence, when it shall appear that the crime intended or offence attempted was perpetrated by such person at the time of such assault or in pursuance of such attempt." Upon well settled principles, in order to justify us in reversing the judgment under this statute, it would be necessary that the evidence should show so clearly that the offence attempted had been consummated, as to leave no support for the verdict convicting the defendant of the attempt. We do not see that the evidence in this case was of that clear and unequivocal character. It is true that the prosecutrix and her mother both testified positively that an abortion had been committed; but the admission

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of the former that she did not know but that she was still *enceinte*, and the evidence offered by the defendant to the effect that she had declared that he had done her no good, and that she was still in a family way, and that she had sued him for obtaining the money which she had paid to him, charging that he had obtained it by means of fraudulent representations and devices, left room for the jury to find, in conformity with what the indictment charged, that an attempt to commit an abortion had been made. It may be doubted whether section 1646, Revised Statutes, applies to an indictment to commit an abortion under section 1268; but upon this point we do not feel called upon for an opinion now.

4. A stipulation has been filed between a member of the bar professing to represent the state as associate with the prosecuting attorney of the court of criminal correction, and the defendant's counsel, to the effect that this court enter judgment reversing the judgment of the court of criminal correction and remanding the cause to that court, because of alleged newly discovered evidence. If this evidence were true, it would have no tendency to controvert the facts charged in the indictment, which the jury by their verdict have found to be true. But aside from this, we decline to enter judgment in conformity with the stipulation, because the stipulation is not signed by the proper officer of the state. Nor do we say that we should accede to it if it were so signed; but, because it is not so signed, we shall not consider it at all; holding, as we do, that counsel retained by private prosecutors have no power to give the consent of the state to the reversal of a judgment which the state has obtained in a criminal prosecution.

The judgment is accordingly affirmed. All the judges concur.

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STATE OF MISSOURI, Respondent, v. WILLIAM KENNEDY, Appellant.

December 9, 1884.

1. CRIMINAL LAW — BURGLARY. — One who enters a house through an open window or door is not guilty of burglary.
2. —— PRACTICE. — Appellate courts will reverse a criminal conviction which is without substantial evidence to support it.

APPEAL from the St. Louis Criminal Court, VAN WAGONER, J.

Reversed as to burglary, and affirmed as to larceny.

R. W. GOODE, for the appellant.

T. B. HARVEY, for the respondent.

THOMPSON, J., delivered the opinion of the court.

The defendant was indicted in one count for burglary in the second degree and larceny. He was convicted of both offences, and his punishment was assessed at seven years in the penitentiary, four years for the burglary and three years for the larceny.

The evidence tended to show that the prosecuting witness, Renn, and one Corcoran, slept in a room on the second floor of a building; that about half-past four o'clock in the morning Renn, who was a street railway conductor, got up and went to his work, leaving Corcoran in bed, and leaving the door of the room open at Corcoran's request; that in order to get from the room to the street it was necessary to pass through two doors; that Renn returned about six o'clock and found that his coat had been stolen; that the window was up and that there were marks on the window and awning which indicated that the thief had entered or escaped through the window. As to whether the window was up at the time the thief entered, the evidence is not clear. Renn testifies that he shut the window when he went to bed; that he did

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not notice it open when he got up, and that he could not say whether it was up or down when he left the room. Corcoran could not say whether it was open or shut when he (Corcoran) went to bed; but it does not appear which went to bed first, Renn or Corcoran. For aught that appears Corcoran may have gone to bed last and left the window open. There is nothing in the testimony which excludes this hypothesis; and the prisoner was entitled to the benefit of whatever doubt there was on this point.

Then supposing that the entrance may have been made through the door, the inner door was certainly open when the entrance was effected, and whether the outer door was open or shut, there was no evidence. If the thief climbed in through an open window or walked in through an open door, the offence was not burglary. The other evidence in the case was sufficient to sustain the verdict for the larceny. But we do not think that the evidence was sufficient to take the case to the jury upon the question of burglary, and we therefore think that the court erred in refusing to instruct the jury, as requested by the prisoner, that they must aquit the defendant of the burglary.

Following the precedent of *The State* v. *Alexander* (56 Mo. 131), and *The State* v. *Bruffey* (11 Mo. App. 79), we therefore reverse the judgment as to the burglary and affirm it as to the larceny. It is so ordered. All the judges concur.

GEORGE A. SIMMONS, ADMINISTRATOR, Respondent, *v.* JOHN C. DENT, Appellant.

December 9, 1884.

1. STOCKHOLDERS — MARRIED WOMEN. — Under the statute of 1865, a married woman might become a stockholder with all the liabilities thereof for unpaid stock.

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2. —— HUSBAND AND WIFE. — A husband who, in good faith, assigns to his wife, who is capable of taking, his stock in a solvent corporation, is relieved from a stockholder's liability.

APPEAL from the St. Louis Circuit Court, HORNER, J. *Reversed and judgment.*

T. K. SKINKER, for appellant: Power to become a stockholder, *ex vi termini*, imports power to assume the liability of a stockholder. As applied to persons *sui juris*, the rule is that a subscription for stock or an acceptance of shares imports a promise to pay calls. — Thompson on Stockholders, sect. 105; *Upton* v. *Tribilcock*, 91 U. S. 48; *Sanger* v. *Upton*, 91 U. S. 64; *Brigham* v. *Mead*, 10 Allen, 245. The savings bank act (Gen. Stats. 1865, p. 366, sect. 14), while permitting married women to "become stockholders," declares no exemption from liability in their favor; therefore none exists. — *Reciprocity Bank Case*, 22 N. Y. 15; Laws N. Y. 1849, p. 340, sect. 2. The purpose of the act could not have been merely to enable married women to accept and hold stock without incurring liability thereon. No statute was needed for this. It is a common-law right. — Thompson on Stockholders, sect. 233; *Deming* v. *Williams*, 26 Conn. 226. Nor could it have been intended to confine the privilege to married women having separate estates. No such limitation is expressed, and no language used from which it can be implied. Neither was a statute needed for this. — Thompson on Stockholders, sect. 233. Neither is this provision merely declaratory of the common law. It was not contained in the savings bank act of 1855, nor is it in the present act. — Rev. Stats. 1855, ch. 36, pp. 382, 383; Rev. Stats. 1879, ch. 21, art. 7, pp. 163–168. Nor did it ever apply to any corporations except savings banks. In case of original subscription by a married woman, how could it be claimed that she is not liable for calls? By section 2 of the act ten per cent is required to be paid at the time of subscribing, and the rest "upon such calls and upon

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such terms as the directors may from time to time prescribe." —Gen. Stats. 1865, p. 365, sect. 2; Acts 1868, p. 30. This is as applicable to married women as to others. If not, who was to pay the calls after the first ten per cent? Not the husbands. They are not mentioned in the act, and at common law a husband is not liable on his wife's undertakings, except for necessaries.—Pars. on Con. (5th ed.) 347. It was certainly not intended there should be no liability. What sort of places for the safe keeping of money would these banks be, with a class of stockholders, no one could tell how numerous, subject to no liability? Besides, the legislature had no power to create a class of stockholders exempt from liability.—Const. Mo. 1865, art. 8, sect. 6; *Central, etc., Assn.* v. *Ins. Co.*, 70 Ala. 120, 134. The provisions of the general law prescribing the remedies against defaulting stockholders have always been broad enough to include married women.—Gen. Stats. 1865, p. 328, sect. 13; p. 329, sect. 15. The stockholder's liability is a debt, and after call a "due." —*Eppright* v. *Nickerson*, 78 Mo. 488; *Hannah* v. *Moberly Bank*, 67 Mo. 686. There is no warrant in the statute for distinguishing between the liability of a stockholder by subscription and a stockholder by transfer. The fact that Mrs. Dent had no property other than this stock when the transfer was made to her (if she could be said for this reason to be insolvent), is immaterial, because the transfer was made in good faith and not to escape liability on the stock.—Thompson on Stockholders, sect. 215; *Miller* v. *Ins. Co.*, 50 Mo. 57; *Provident Sav. Bk.* v. *Skating Rink*, 52 Mo. 558; *Treadway* v. *Commercial Agency*, 13 Mo. App. 582; *McClaren* v. *Franciscus*, 43 Mo. 452. *Bowden* v. *Johnson*, 107 U. S. 261, and *Weston's Case*, L. R. 5 Ch. App. Cas. 618, 621, are cases of actual fraud and not applicable here. Defendant having transferred his stock *bona fide* and with the bank's consent, long before Tucker became a creditor, the latter has no re-

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course upon him. His only recourse is against those who were stockholders at the time his debt accrued, or have become such since. — *Erskine* v. *Peck*, 13 Mo. App. 284; *In re London, Bombay, etc., Bank*, L. R. 18 Ch. Div. 581; *Parson's Case*, L. R. 8 Eq. Cas. 656.

H. I. D'ARCY and J. P. MAGINN, for the respondent: The statutes of 1865 do not authorize a married woman to become a stockholder in a bank. — Gen. Stats. 1865, pp. 365–367; Morawetz on Priv. Corp., sect. 602; *Musick* v. *Dodson*, 76 Mo. 625; *Clark* v. *National Bank*, 47 Mo. 17; *Alt* v. *Meyer*, 8 Mo. App.—; *Griswold* v. *Seligman*, 72 Mo. 125; *Fisher* v. *Seligman*, 75 Mo., 24. If a married woman could not assume a personal liability on stock, her transferee does not escape his personal liability by the transfer. There is always a liability somewhere. — *Johnson* v. *Laflin*, 6 Cent. L. J., 127; *Webster* v. *Upton*, 1 Otto, 71; *Upton* v. *Tribilcock*, 10 Otto, 47; Ang. & Ames on Corp. (10th ed.), sect. 623; *Fisher* v. *Seligman*, 75 Mo., 13; *Skrainka* v. *Allen*, 76 Mo. 391; *McClaren* v. *Franciscus*, 43 Mo. 468.

BAKEWELL, J., delivered the opinion of the court.

This is a motion by a judgment creditor of the Butchers and Drovers' Bank, for execution against the defendant as a stockholder in that corporation. Defendant resists recovery on the ground that he has long since transferred his stock to his wife Ann Amanda Dent, and is no longer liable thereon. The case was submitted on an agreed statement of facts, and the court below sustained the plaintiff's motion, and ordered execution to issue against defendant for $1,500. Defendant in due time and manner excepted to the rulings of the court, and preserved his exceptions, and now brings the case to this court by appeal.

The agreed statement of facts is as follows: —

"1. That on the 14th day of May, 1867, the Butchers and Drovers' Bank of St. Louis was duly incorporated under

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chapter 68 of the General Statutes of Missouri of 1865, entitled 'Of Savings Banks and Fund Companies,' as a savings bank or savings association, located in the city of St. Louis, with a capital stock of $500,000, divided into shares of $100 each.

"2. The plaintiff is a judgment creditor of the bank to the amount of $10,800, with *nulla bona* return on his execution, but that the said indebtedness did not exist on the 13th day of November, 1869, but accrued long thereafter.

"3. That defendant, John C. Dent, was an original subscriber for thirty shares of the capital stock of said bank in the month of May, 1867, and held the same in his own name upon the books of said bank until the 13th day of November, 1869, during which time $30 per share were paid in upon said stock; that on the 13th day of November, 1869, defendant, being at that time free from debt, executed a transfer upon the transfer books of said bank of the said thirty shares of stock to Ann Amanda Dent, who at that time was, and ever since has been, and yet is the wife of defendant; that said bank, on the 13th day of November, 1869, and at all times thereafter, knew that said Ann Amanda Dent was the wife of defendant. A copy of said transfer appears in the record. It is in the ordinary form.

"4. That prior to said date, to wit: in the year 1866, the said Ann Amanda had received from her father's estate the sum of $500 in gold coin, which sum she had delivered to her said husband to keep for her; that he had used the same for his own purposes, and that afterward, wishing to reimburse her for her money so used, he made the transfer aforesaid; that after the said transfer, viz.: on the 11th day of July, 1873, the said Ann Amanda, upon a call of the board of directors of said bank, paid upon said stock the sum of ten dollars per share by the application of dividends at said date declared upon said stock, and thereupon surrendered to said bank the certificate received by her upon the transfer aforesaid, and received in lieu thereof a certi-

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ficate, copy of which appears in the record. It recites that Mrs. Ann Amanda Dent is entitled to thirty shares of the stock, 'the par value of which is $100 per share, of which forty per cent has been paid. This certificate is issued subject to the right of the bank to call in the remainder in such sums and at such times as its board of directors may order, and for the payment of which this stock is hypothecated.' For this certificate she gave her personal receipt. Again, on the 10th day of July, 1875, upon a further call of said board, the said Ann Amanda paid upon the said stock the further sum of ten dollars per share by application of dividends at said date declared upon said stock, and thereupon surrendered to said bank the certificate last above described, and received in lieu thereof a certificate, copy of which appears in the record, and is identical with the one surrendered, except that it recites that fifty per cent had been paid.

"For this defendant John C. Dent gave his receipt.

"5. That no other payments have ever been made on said stock, and that $50 per share yet remains unpaid, and that no call has ever been made by said board of directors for said balance; that after the 13th day of November, 1869, seven dividends were from time to time declared by said bank; that on each of these occasions the name of said Ann Amanda appeared in the books of said bank as the holder of said thirty shares of stock, and on each occasion the dividend was paid to her in person, and she receipted in writing for the same in her own name; that the last of these dividends was paid in the month of July, 1875, on or about the same day when the receipt hereinbefore referred to was given by the said John C. Dent; that ever since the said transfer of November 13th, 1869, said Ann Amanda has claimed the said thirty shares of stock as her property, and said claim has always been recognized by said bank and by said John C. Dent, and said John C. has at no time since the transfer asserted or offered to assert any title

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thereto in himself, and has at no time had any stock in said bank other than said thirty shares.

"6. That on the 29th day of November, 1873, by deed duly recorded, for an expressed consideration of $18,000 one John Mahon conveyed to said John C. Dent a lot of land in the city of St. Louis, with all the improvements thereon, in trust for the said Ann Amanda, her heirs and assigns, for the sole and separate use, benefit and enjoyment of said Ann Amanda, and entirely free from all control, restraint or interference whatever of said John C. with full power in said Ann Amanda to direct the disposition of said lands, and also to appoint another trustee to hold said land in the place and stead of the said John C.; that on the 11th day of June, 1881, said Ann Amanda and her said trustee sold and conveyed said lot to one Web. M. Samuel, and that said Ann Amanda has not now any separate estate, and that at the date of said transfer she had no property, separate or otherwise, except said stock."

There can be no doubt whatever, that, where a company is in difficulties, and the owner of stock makes a formal transfer to a man of straw to escape individual liability, such a transfer made in fraud of the creditors of the corporation does not exempt the transferor from the individual liability imposed upon him by the statute. A transferor who transfers stock to one whom he knows to be incapable of filling the place of a solvent stockholder, in order to escape liability upon the stock, would be estopped to deny, as to creditors, that he was still a stockholder, and would remain liable to the corporation creditors. *McClaren* v. *Franciscus*, 43 Mo. 467; *Pro. Sav. Inst.* v. *Jackson Place Skating Rink*, 52 Mo. 558. The American cases, as is remarked in Thompson on Stockholders (sect. 215), seem to make this very much a question of intent. "It is a universal principle of common law," says Adams, J., in *Miller* v. *Great Republic Insurance Company* (50 Mo. 57), "that the absolute ownership of property carries with it

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the right to transfer or dispose of it as the owner may deem proper. He can not do this so as to defeat the claim of honest creditors. In a case like this, a creditor has no claim against a stockholder until he has exhausted his remedy against the company; or rather, his claim commences from the time he issues his execution against the company. If, before any execution be issued, the stockholder shall have honestly, and without any intention to defeat the creditors of the company, sold and transferred his stock, the mere fact that the purchaser was insolvent at the time, is not sufficient to hold such stockholder liable for the debts. The question in such case is, whether the transfer was fraudulent and void as to the creditors of the company. If the stockholder knew of the insolvency at the time of the transfer, it would be very strong evidence of fraud, and it would be hard to resist the conclusion that such a transfer was made in bad faith."

The English doctrine seems to be, that the stockholder is liable until a substitute is found for him, while the American doctrine would seem to be, that, where the transfer is effected, though to an infant or to one incapable of taking, the question is one of good faith, and the liability of the transferor to creditors ceases where the transferor had no knowledge of the incapacity of the transferee.

At common law, a transfer to the wife by the husband could, however, hardly relieve him of liability upon the stock; could the transfer be effected, he would be liable upon the stock as her stock, as he would be liable upon stock received by her from any source during coverture, (*Thomas* v. *City of Glasgow Bank*, 6 Reltie, 607) and which he had reduced to possession.

By statute in this state, however, the wife was capable of becoming a stockholder, that is, as we interpret the law, of holding stock in her own right, and of assuming all the rights and all the liabilities of a stockholder. If we are right in this view of the law, we think that, upon well set-

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tled principles, the agreed statement shows such a transfer of stock as entirely relieved the defendant of any liability in account of it to the creditors of the company.

The savings bank act of 1865, in force when the Butchers and Drovers' Bank was incorporated, and when the transfer was made to Mrs. Dent (Gen. Stats. 1865, p. 366 sec. 14), authorized married women to become stockholders in a bank, and to assume the liability of a stockholder. Independently of the statute, a married woman might hold stock.

The English rule is said to be, that, where a man marries a stockholder, if he allows the shares to remain in her name, he is liable upon them, but where he has not reduced them to possession, this liability is only for liabilities of the company accruing during coverture. Thomp. Stock., sec 233. In New York it is held, however (*In re Reciprocity Bank*, 22 N.Y. 9), that, where the *status* of the married woman remains as at common law, if the husband reduced to possession the stock owned by the wife before coverture, he will be liable to creditors if the corporation fails; but where there was no reduction to his possession, she would be liable to the creditors under a statute making the shareholders individually liable.

The language of the Missouri statute is as follows (Gen. Stats. 1865, p. 366, sec 14): "Married women may become stockholders, and may deposit money with any bank or savings institution incorporated under the laws of this state, or doing business by virtue of the several acts of congress providing for the organization of national banks, and any receipt or other acquittance given by such married woman for such deposits shall be valid and binding as if given by a *feme sole*."

We see no reason for supposing, as is suggested by learned counsel for respondent, that the legislature intended this provision to extend only to fund companies.

It is true that, in *Clark* v. *National Bank* (47 Mo. 17),

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Judge Currier, in delivering the opinion of the supreme court, says, in regard to this section: "This statute empowers a married woman to execute valid acquittance for deposits of the class mentioned, but leaves her in all other respects in the same condition she was at common law. Independently of the statute, she was competent to make deposits and hold shares in moneyed corporations. In such cases, if she survived her husband, she would hold the stock or deposit as against her husband's legal representatives, and so, except as to creditors, although the consideration of the deposit or purchase moved from the husband. But this does not affect the right of the husband, during the lifetime of the wife, to reduce her chattels and choses in action into possession and thus defeat her rights. The statute, then, has this extent and no more: it empowers a married woman in the cases specified to execute a valid receipt or discharge. It enables her to deal with the bank without the intervention of her husband, but it does not take from the husband his common-law rights in, or control over, the fund. There is nothing in the act to intimate such a purpose. When the legislature shall deem it expedient to modify the common-law relations between husband and wife, and to divest the former of his interest in and control over the personal effects of the latter, it will doubtless so declare in fitting and appropriate terms, and not leave its purposes in this respect to a doubtful construction."

This language, however, must be considered as applying to the question before the court, which was simply whether a husband by his check upon the bank could reduce to possession the money deposited there by his wife. We do not think it can be extended to mean that the legislature, in saying that a wife must be a stockholder, meant nothing, or meant that she could be a stockholder without assuming any of the obligations of a stockholder.

In Missouri, it is the old established doctrine that, when

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a woman contracts, she contracts on the credit of her property, as to which she is in equity a *feme sole*, and may bind it by her contracts, whether in writing or not, and whether the property be referred to or not, and that it is liable for her general engagements. *Miller* v. *Brown*, 47 Mo. 504; *Hooten* v. *Ransom*, 6 Mo. App. 23. We are of opinion that the legislature, by providing that a woman may be a stockholder in a savings bank, meant, and could mean only, that she should be understood to enter into the ordinary engagements of a stockholder by subscribing for or accepting stock, and should not, because of any disability of coverture, be exempted from the ordinary liabilities. The acceptance of shares in an ordinary case, imparts a promise to pay calls for unpaid subscriptions. 91 U. S. 48; 3 Sandf. 161; 10 Allen, 245. The constitution in force when this stock was transferred (Const. 1865, art. VIII. sect. 56), provides that, in all cases "each stockholder shall be individually liable, over and above the stock, by him or her owned, and any amount paid thereon, in a further sum at least equal in amount to such stock." It was not competent for the legislature to nullify this provision; and when it said that a married woman may be a stockholder, it was quite unnecessary to add that she should be liable as other stockholders for unpaid stock.

The object of the statute declaring the individual liability of the stockholder is to establish something behind the liability of the corporation as a protection to creditors. In the case before us, the transferee was capable of assuming the liability of a stockholder. That she was not at the time of the transfer pecuniarily responsible, is immaterial under the facts agreed upon. She was legally liable, and might become responsible. As the corporation was prosperous at the time of the transfer, as appears by the dividends declared, and as the transfer was not made with intent to defraud or escape liability on the part of the transferor, we are of opinion that he was thereby released.

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Lowell Tr. Stock., sect. 197; *Miller* v. *G. R. Ins. Co.*, 50 Mo. 57.

We, therefore, think that the judgment should be reversed, and judgment entered here for defendant. It is so ordered. All the judges concur.

JAMES ANDREWS, Defendant in Error, *v.* ST. LOUIS TUNNEL RAILROAD COMPANY ET AL., Plaintiffs in Error.

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December 9, 1884.

1. **MECHANIC'S LIENS — RAILROADS. — Labor and materials provided for in the contract and necessary for the work, may be covered by a mechanic's lien, though they are not actually incorporated in the structure.**
2. **CONSTITUTIONAL LAW. — The railroad lien act of March 21, 1873, did not go into effect until ninety days after its passage.**
3. **—— PRIORITY OF LIENS — FORECLOSURE OF DEED OF TRUST. — The lien of a deed of trust executed prior to the passage of the act of March 21, 1873, is superior to that of a lien for materials furnished for the road after the passage of the act but prior to the expiration of the ninety days, though a portion of the purchase price of the secured bonds was not paid until after the making of the contract for the materials for which a lien is asked.**
4. **—— EQUITY. — The foreclosure of the deed of trust under such circumstances leaves nothing for a court of equity to adjust as between the respective lien claimants, and vests a complete title in the purchaser at the foreclosure sale.**

APPEAL from the St. Louis Circuit Court,

Reversed and jugdment.

WELLS H. BLODGETT, for the plaintiffs in error: The act of March 21, 1873, took effect ninety days after its passage, because no other time was therein appointed. — Wag. Stats. 1872, p. 894, sect. 4. It is not sufficient that certain parts of the act might bear a construction which would, taken separately, give those parts effect at an earlier period. The legislature must direct when the act as a whole shall take effect. — *Wheeler* v. *Chubbuck*, 16 Ill. 261; *Board of*

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Supervisors, etc., v. *Keady*, 34 Ill. 293; *The State* v. *Little Rock, etc., R. R. Co.*, 31 Ark. 701. The words "prior to the passage of this act," had before their introduction into this law been judicially construed to have reference to the time of the taking effect of the law, and not to the date of passage. — *Charles & Blow* v. *Lamberson*, 1 Iowa, 435; *Rogers* v. *Vass*, 6 Iowa, 405; *Graham* v. *Springfield*, 21 Me. 58; *Jackman* v. *Garland*, 64 Me. 133. If the act did not go into effect until ninety days after its passage, or until June 19, 1873, then the plaintiff can have no lien, because he began work under his contract on April 21, and what he did before the act took effect can not be separated from what he did afterwards. — *Donahy* v. *Clark*, 12 Cush. 440; *Edgar* v. *Salisbury*, 17 Mo. 270; *National Bank of Salem* v. *Redmon*, 57 Me. 405; *Baker* v. *Fessenden*, 71 Me. 292. The bonds secured were negotiable by the law merchant without the words "value received." — *Gargier* v. *Mieville*, 3 B. & C. 45; *Hatch* v. *Frayes*, 11 A. & E. 702; *McLeod* v. *Snee*, 2 Ld. Ray. 1481; *Mercer County* v. *Hackett*, 1 Wall. 83; *Cota* v. *Burk*, 7 Metc. (Mass.) 588; *Stevens* v. *Blunt*, 7 Mass. 240. If the bonds were negotiable, then they were good in the hands of any innocent holder for value. — *Murray* v. *Lardner*, 2 Wall. 110; *Consolidated Association* v. *Numa Avegno*, 28 La. An. 552; *City of Elizabeth* v. *Force*, 20 N. J. Eq. 587; *Spooner* v. *Holmes*, 102 Mass. 503. When delivered the bonds took effect from their date by relation. — *Snaith* v. *Mingay*, 1 M. & S. (K. B.) 87; *Powell* v. *Waters*, 8 Cow. 670; *Huston* v. *Young*, 33 Me. 85. If the bonds were negotiable, then by whatever title parties took the bonds, by that title they took the security. — *Logan* v. *Smith*, 62 Mo. 455; *Goodfellow* v. *Stillwell*, 3 Mo. 17. Purchasers were not bound to inquire whether the bonds were issued simultaneously with the execution of the mortgage by which they are secured. — Jones on Railroad Securities, sect. 210.

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JOHN C. BROWN, of counsel for the plaintiffs in error.

ROMBAUER & GOLDSMITH and A. G. COCHRAN, for the defendant in error: What construction shall be placed upon these words, "subsequent to the passage of this act." There can be no doubt that an act is passed when it receives a majority of the votes of both houses and is approved by the governor.—*Logan* v. *The State*, 3 Heisk. 442; *Wantmann* v. *City of Phila.*, 33 Pa. St. 202; *The People* v. *Clark*, 1 Cal. 406; *Brainard* v. *Bushnell*, 11 Conn. 17; *In re Richardson*, 2 Story, 580; *Baker* v. *Compton*, 52 Texas, 258. If the act of March 21st did not take effect until ninety days after the date of its passage, the defendant in error would still clearly be entitled to his lien.—*Walker* v. *Railway Co.*, 2 Cent. L. J. 481; *Hauptmann* v. *Catlin*, 20 N. Y. 250. "The act applies, where a contract for a building was made before its passage, to a claim for labor or materials supplied after its passage in performance of the contract."—*Sullivan* v. *Brewster*, 1 E. D. Smith, 681; *Miller* v. *Moore*, 1 E. D. Smith, 739. "The doctrine as to mechanics' liens now is that the statute is highly remedial in its nature, and should receive a liberal construction to advance the just and beneficent objects had in view in its passage."—*De Witt* v. *Smith*, 63 Mo. 263; *Putnam* v. *Ross*, 46 Mo. 337; *Aster* v. *Rabenau*, 46 Mo. 599; *Dewitt* v. *Smith*, 63 Mo. 263; *Morgan* v. *Railroad Co.*, 76 Mo. 172. "All the plaintiff is required to show is the fact that the materials were furnished for the purpose of being used in constructing the building."—*Morrison* v. *Hancock*, 40 Mo. 561. Even if there were some objectionable items in the account they are easily separable from other items to which there can be no objection, and for those latter respondent would have a lien.—*Edgar* v. *Salisbury*, 17 Mo. 273; *Allen* v. *Mining and Smelting Co.*, 73 Mo. 688. It is a well settled doctrine in regard to mortgages securing future advances that "where the mortgagee is not bound to make the advances, and has actual notice of a later

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encumbrance upon the property for an existing debt or liability, such later encumbrance will take precedence of the mortgage, as to all advances made after such notice." — *Frye* v. *Bank of Ill.*, 11 Ill. 367; *Spader* v. *Lawler*, 17 Ohio, 371; *Hughes* v. *Worley*, 1 Bibb, 200; *Bell* v. *Fleming*, 11 N. J. Eq. 13, 490; *Boswell* v. *Goodwin*, 31 Conn. 74; *Bank of Montgomery Co.'s Appeal*, 36 Pa. St. 170; *Ter Hoven* v. *Kerns*, 2 Barr, 96; *Parker* v. *Jacoby*, 3 Grant (Pa.) 300. "The proper object of a bill in equity to foreclose a mortgage is to cut off all rights subsequent to the mortgage. The rights of any one so interested, not made a party to the bill, are not affected by the decree of foreclosure and the sale under it, but he may redeem as before the sale." — *Rogers* v. *Holyoke*, 14 Minn. 220; *Gould* v. *Wheeler*, 28 F. N. Eq. 541; *Stewart* v. *Johnston*, 30 Ohio St. 24; *Murdock* v. *Ford*, 17 Ind. 52; *Farwell* v. *Murphy*, 2 Wis. 533; *Shaw* v. *Heesey*, 48 Iowa, 468; *Carpentier* v. *Brenham*, 40 Cal. 221.

LEWIS, P. J., delivered the opinion of the court.

The plaintiff, under a contract with the defendant Tunnel Railroad Company, dated April 21, 1873, constructed its tunnel and railway from Third Street to the south line of Market Street, in the city of St. Louis. His account for labor and materials furnished amounted to $661,576.65, of which sum the tunnel company paid him $583,147.42, leaving unpaid a balance of $78,429.23. For this balance he asks judgment, with a lien on the tunnel and railway property, under an act of the general assembly, approved March 21, 1873, and transcribed into the Revised Statutes at sections 3200 and the sixteen there next following. There is no dispute about the plaintiff's right to a general judgment for the amount claimed, with interest; but the defendants, the Tunnel Railroad Company, and Barton Bates and Charles Tracy, trustees as hereinafter shown, resist the imposition of the lien.

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One objection raised against the lien rests on the ground that some items in the account filed are not proper subjects of a lien under the law. These items may not appear to have been for either labor or materials incorporated in the actual construction of the tunnel, the road-bed or the railway. But, for aught that this record shows, every one was for labor or material as essential to the construction, or to some duty to the public arising from its practical necessities, and specially stipulated for in the contract as were the rails, the ties, or any material or labor used in the work. No lien could be claimed for them, if they were severable from the construction to be duly performed under the contract, or if they were set up as independent demands resting upon their own merits, without reference to the contract or the work contracted for. The items here objected to are chiefly for taking down houses on the line of the tunnel, for temporary bridges, sewers, water and gas pipes, etc., necessary to the public convenience while the work was progressing, or after its completion, and specifically provided for in the contract. The weight of authority in similar cases is decidedly in favor of the lien. *Hazard P. Co.* v. *Byrns*, 21 How. Pr. 189; *Winslow* v. *Urquhart*, 39 Wis. 268; *Vandegrift and Forman's Appeal*, 83 Pa. St. 127; *Willamette Co.* v. *Renick*, 1 Ore. 169. We remark upon this point, not because it may influence our determination of the cause before us, but chiefly for the purpose of explaining or modifying, if need be, what was said by this court in *Knapp* v. *Railway Co.* (6 Mo. App. 205). The principal point decided in that case was, that a lien for work done upon a railroad must cover the whole road, and not a part of it alone. In this conclusion we were sustained by the supreme court. 74 Mo. 374. But a remark was incidentally made from which it might be inferred that, in our view, nothing can be made the subject of a lien, whether provided for in the contract or not, which is not visibly incorporated in the structure itself, as it stands when com-

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pleted. We wish to be understood as holding, with the authorities above cited, that labor or materials not incorporated in the structure may properly be covered by the lien, if necessary to the work and provided for in the contract. It is only when one of these conditions fails, or both of them, that the objection may prevail. The point is not well taken in the present case, as was properly held by the learned judge of the circuit court.

Many questions which appear to arise on the present appeal have been very ably argued by the counsel on both sides. Their materiality, however, wholly depends on the correctness of the circuit court's ruling on the proper construction of the statute from which the plaintiff infers a right of lien. If it be found necessary to reverse that ruling, the plaintiff's lien claim must fail, whatever may be true of some other propositions on which he relies.

The act provides: "Section 1. All persons who shall do any work or labor in constructing or improving the road-bed, rolling stock, station houses, depots, bridges, or culverts of any railroad company incorporated under the laws of this state, or owning or operating a railroad within this state and all persons who shall furnish ties, fuel, bridges, or materials to such railroad company, shall have, for the work done and labor performed, and for the materials furnished, a lien upon the road-bed, station houses, depots, bridges, rolling stock, real estate, and improvements of such railroad, upon complying with the provisions hereinafter mentioned: provided such work and labor is performed, and such materials are furnished, under and in pursuance of a contract with such railroad company, its agents, contractors, subcontractors, lessees, trustees, or construction company organized for the uses and purposes of such railroad company, or having in charge the building, construction, or improvement of such railroad or any part thereof.

"Sect. 2. The lien aforesaid shall attach to the buildings, erections, improvements, road-bed and property

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mentioned, from the date of the commencement of such work and labor, or from the time such materials were furnished or delivered, and shall be prior to all mortgages or encumbrances placed upon the property affected by this lien, subsequent to the passage of this act." Sess. Acts, 1873, p. 59.

This act of the general assembly was approved on the 21st day of March, 1873. Another statutory enactment then in force was as follows: "All acts of the General Assembly shall take effect at the end of ninety days after the passage thereof, unless a different time is therein appointed." Wag. Stats. p. 894, sect. 4.

In the lien act of March 21, 1873, there was no appointment of the time when it should take effect, unless this may be found in the concluding words of section 2, above copied. It was held by the circuit court that, by force of those words, the act went into effect, for all purposes, on the day of its approval. Having carefully read the able opinion given on this point by the learned judge of the circuit court, we think, nevertheless, that his conclusion is inflexibly opposed by the soundest reasoning and authority. There is some attempt to distinguish between the effect of a constitutional regulation fixing the time when acts of the General Assembly shall go into effective operation, and that of a legislative declaration to the same purpose. There is no basis for the distinction supposed. An expression of the legislature's will, within the scope of its constitutional powers, is as absolutely binding on the citizen, and on the courts, as if uttered by the constitution itself. There can be no degrees of comparison between two authorities uttering the same command, where either is entitled to unquestioning obedience.

The act of March 21, 1873, created a method of enforcing the rights of railway contractors, which had never existed before. It established new conditions of ownership in the entire property of railway corporations, rendering it liable to compulsory alienation in newly devised contingencies,

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and, to that extent, introduced a radical change in all their tenures and titles. It gave a new jurisdiction and authority to the courts; empowering them, by forms and processes hitherto unknown, to sweep away, in certain events, all the holdings of an influential business corporation, for the satisfaction of a single creditor. It provided in an elaborate way for forms of procedure, for duties and conditions to be observed, respectively, by all the parties concerned, including the officers of the courts, and for methods whereby the corporation and its property might be finally released from the judical grasp in contemplation.

All this, and more, the act did, in seventeen sections of compact statutory law, covering three pages of the Session Acts. As to all the rules of action thus provided for, not a word appears in the act, directly declaring, either in general or in specific terms, when they, or any of them, shall begin to be in force. We are invited to perceive, however, that inferentially, the time for all these important changes is to be that mentioned in connection with the incidental contingency of possible outside incumbrances which may or may not appear in any case. This seems to be a clear case, to use a phrase whose peculiar illustrative force may excuse its appearance here, of the "tail wagging the dog." We do not think that the legislative intent so appears. At the same time, it is not to be denied that a different view is here sustained by very able arguments of learned counsel, and by at least one authority which always commands our most profound respect. All the statutory laws in force at a given time must be construed as if published in a single utterance of the legislative will. The general provision declaring when all acts of the General Assembly should be deemed to take effect, must be read as if it were a part of every act passed while it continued in force. If it were thus visibly incorporated in the act under consideration, the effect would be a legislative announcement, substantially, that "this act shall take effect at the end of ninety days

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after its passage, if a different time is not herein appointed." In the face of such an announcement in the body of the act, would it be very easy to discern in a special provision affecting encumbrances not mentioned anywhere else, an "appointment" of the time when the entire system, in all its ramifications, should become a feature in the laws of this state? "But," it will be said, "the whole object of the statute is to protect railway contractors against liens or encumbrances in favor of other parties. Therefore, a provision which limits by a date the effectiveness of all 'mortgages or encumbrances,' does, substantially and by clear implication, make that date the appointed time when the privileges of the act are to be placed within the reach of the contractor." We answer that both the premises and conclusion are unsound. The object of the statute is to enable the contractor to fasten upon the railway property and secure its availability for the satisfaction of his demand at the proper time without waiting to obtain judgment and execution, and without taking the chances of a race with other creditors pursuing a like judgment and execution, or the chances of an absolute alienation by the company of its property before a judgment can be reached. The objection is conclusively answered by the fact that all these prominent objects of the statute may be thoroughly accomplished, even where there are "no mortgages or encumbrances" in the case, and therefore nothing for the concluding terms of the second section to operate upon.

Let us suppose a case. A railway contractor makes his contract on the 22d of March, 1873 — one day after the approval of the act under consideration. He finishes the work in a week, and within another week has filed his lien claim and begun his suit upon it in the circuit court. Before the expiration of ninety days after the approval of the act, his case comes up for hearing and adjudication. The defendant objects, by demurrer or otherwise, that no law is yet in force which entitles the plaintiff to the relief

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asked for — citing the ninety days' provision above quoted. The plaintiff responds by showing from the second section, that his lien (when authorized and perfected according to the act, if this be in force) "shall be prior to all mortgages or encumbrances placed upon the property * * * subsequent to the passage of this act." It appears, however, that there are no mortgages or encumbrances in the case, and no reason for supposing the existence of any. The presiding judge, therefore, does not see why he should concern himself about this particular provision, since it touches no fact, right, or priority involved in the issues before him. But the plaintiff is not yet discouraged. He shows the court that the provision must be construed to mean the taking effect of the entire act at the date of its approval, because otherwise, upon its taking effect only at the end of ninety days, its treatment of mortgages and encumbrances, reaching back to the date of approval, would be retroactive, and therefore unconstitutional and void. The court would find no difficulty in this position. Without hesitation, it would decline to pass upon the supposed constitutional question, until that should distinctly arise in a contention concerning the alleged priority of a mortgage or encumbrance coming within the terms and intent of the provision. No such contention being yet present, the provision must stand for what it clearly expresses, and no more. It certainly does *not* express, in words which the law-maker would naturally use to that end, that the entire act shall be in force from and after its passage. The court would therefore be compelled to fall back on the ninety days' provision, whose general terms are direct and unmistakable, and are not qualified in the alternative way for which it stipulates. That such would be a correct conclusion in the case supposed, seems to be unquestionable. If then, it would involve a proper determination of the time when the lien act was intended to become operative, how could it be said in another

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case that, because of a different state of facts, the law was intended to go into effect at a different time?

The supposed constitutional difficulty, however, may be met squarely. It is not unusual, when a particular statutory provision, by reason of its comprehensiveness, is found to be in collision with the constitution, to limit its effect, if this may be done by a reasonable interpretation, so as to bring its operation within the constitutional powers of the legislature, and thus give due effect to the legislative intent in the whole enactment. This is done upon the presumption that the legislature intended to act within the limits of its constitutional authority, and it is the duty of the courts to carry out that intent, so far as it may be done without violence to the manifest purposes of the law-making power. Interpretation, in such a case, belongs to the particular provision which is brought into question. But we know of no precedent for wresting an entire act, having numerous and comprehensive functions, from the sphere to which it has been assigned by an imperative rule of legislation, in order to make a single sentence mean what it falls far short of saying, and so to avoid a possible abrasion of the constitution. In those states where constitutional or statutory rule prevails, postponing the time when the legislative enactments shall go into effect, if no time is otherwise appointed, it has been repeatedly held that, to take an act out of the general terms of the regulation, there must be a direct and explicit declaration of the legislative intent to that effect. Thus, in *Wheeler* v. *Chubbuck* (16 Ill. 361): "But such direction must be made in a clear, distinct, and unequivocal provision and can not be helped out by any sort of intendment or implication. * * * Wherever it is designed that a law shall go into force before the expiration of the sixty days, we universally find a separate clause at the end of the act, of the following purport. 'This act to take effect and be in force from and after its passage.' In the law in question there is no distinct clause declaring

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when the act, as a whole, should take effect, and become an operative law. It is true that the act says, that after the first day of March next, certain acts should not be done. * * * In order to take an act out of the constitutional provision, the legislature must direct that the act, as a whole and entirety, shall take effect at a different time; and it is not sufficient that certain parts of it might bear a construction which would, taken separately, give those parts effect at an earlier period." That case furnishes a very close parallel to the one before us. Its ruling was re-affirmed and applied by the same court in *Board of Supervisors, etc., v. Keady* (34 Ill., 293). The constitution of Arkansas ordains that, "no public act shall take effect or be in force, until ninety days from the expiration of the session at which the same was passed, unless it was provided otherwise in the act." An act of the legislature, approved July 21, 1868, provided for the issuing of certain bonds in aid of railway construction, and directed, among other things, that a poll should be opened "at the next general election, to be holden under the provision of section 3, article XV. of the constitution of this state," wherein the ballots of the electors should determine their acceptance or rejection of the law. An election was duly held at the time thus appointed. But the supreme court held that the election was void, because the ninety days had not expired after the end of the session at which the act was passed; thus refusing to consider the fixing of an election within the specified period, for the express purpose of giving effect to the law, as any indication of the legislative intent to "provide otherwise in the act." for the time when it should go into operation. *The State* v. *Railway Co.* (31 Ark. 701). This seems to be a much stronger case than the one to which we are here asked to apply a contrary method of interpretation. Reference is made to *Baker* v. *Compton* (52 Texas, 252). We do not find the case clearly in point. It is apparent from the opinion of the court that the whole

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act under consideration would have been found to be virtually inoperative, unless a literal effect was given to the section which directed certain duties to be performed "from and after the passage of this act." It is already shown that such a result is not to be apprehended with reference to the act we are here considering. The Texas court, however, seems to base its conclusion chiefly on the proposition that "the later act being complete in its provisions, must control;" and thus finds occasion to distinguish between a legislative regulation for the taking effect of statutes, and one prescribed by the constitutional law. That there is such a distinction as to the powers of the legislature, no one will dispute. But when it comes to a question of interpretation by the courts, of the intent of the law maker, there is none whatever. The legislative intent, within the scope of its acknowledged authority, must be sought within the same boundaries of interpretation that would apply to an utterance of the organic law. There is certainly no need of considering any question of legislative power, when the ninety-day rule itself preserves in the legislature the privilege of fixing in a statute any different time for its taking effect. Nor need we entertain any question of "repeal by implication." The only inquiry here is, whether the legislature did really intend to fix a time different from that declared in its own general rule, for the taking effect of the act under consideration. This brings us to a method of discovering the legislative intent, which is more reasonable than that proposed by the plaintiff in this case, and which is sanctioned by precedents of high anthority. Let it be conceded that the words "passage of this act" have reference in their ordinary acceptation, to the date of its approval by the governor. "In the construction of statutes, the intent of the legislature should be carried into effect, and the spirit of the enactment preserved, if practicable. Under this rule, the letter of a statute is frequently sacrificed to

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the general purpose and intent of the act." *Kennedy* v. *Kennedy*, 2 Ala. 571. The Iowa constitution provided that "no law of a public nature shall take effect until the same shall be published and circulated in the several counties of this state, by authority. A law concerning homesteads was embodied in the code, which was approved by the governor on February 5, 1851, but went into effect, under the constitutional provision, on July 1, 1851. It contained a provision for sales "on execution for debts contracted prior to the passage of this law." The supreme court held that the words "prior to the passage" amounted to the same thing as if the legislature had used the word "heretofore," and that either expression must relate to the time of taking effect, and not to the time of passage. *Charless* v. *Lumberson*, 1 Iowa, 435. In *Rogers* v. *Vass* (6 Iowa, 405), the same court held that, "The provision in the act, entitled, 'An act in relation to the swamp lands of this state,' approved January 24, 1857, which provides that the act shall not apply to the actual settlers on said lands at the time of the passage of the act, has legal reference to the time of the taking effect of the act, and not to the time of its passage." An application of this rule to the second section of the act before us, is, in our estimation, the most rational way of giving effect to all the purposes of the legislature, as they appear in the statute, within the scope of its constitutional powers. As was said in *Jackman* v. *Garland* (64 Me. 133), "An act is of no force until it becomes a law." We follow this rule, and give full effect to the undisputed authority of the legislature over mortgages or encumbrances "placed" after the taking effect of the law. The most that can be said on the other hand is, that we apply to the legislation thus controlling encumbrances, a limit as to *time*, which we find prescribed by the constitution in its inhibition of retrospective laws. Not that we might, in any event, substitute a constitutional enactment for one that we deem unconsti-

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tutional. We mean only to show that our interpretation of the legislative intent is in harmony with the law of the constitution. We are of opinion that the act of March 21, 1873, did not become operative as a law, until ninety days after the date of its approval. We can not ignore the fact, however, that in *Walker* v. *Railroad Co.* (2 Cent. L. J. 481), Judge Dillon announced a different ruling. "The phrase," he says, "'subsequent to the passage of this act,' means subsequent to the approval by the governor." No argument or reasoning is offered in support of that eminent jurist's conclusion, further than a citation of authorities, showing what is usually understood by the "passage" of an act. We have no occasion to question the customary application of this term.

The defendant tunnel company executed a mortgage trust deed to Barton Bates and Charles Tracy, trustees, dated January 1, 1873, conveying its entire property, then held or thereafter to be acquired, to secure the payment of one thousand two hundred and fifty bonds, of £200 sterling each, to be thereafter issued and sold or hypothecated for money to be used in building the tunnel and railway. This deed was duly placed on record on February 6, 1873. J. S. Morgan & Co., of London, made advances to the tunnel company on this security to the amount of £100,000, prior to March 22, 1873, and to the further amount of £50,000 within the ensuing two months. In pursuance of a decree rendered by the United States circuit court of St. Louis, the tunnel and railway property was sold in foreclosure of the same mortgage, on the 1st day of July, 1878, and was purchased by Tracy, who had become sole trustee, for the benefit of the bondholders, at the price of $450,000.

The plaintiff in the present case completed his work on or about October 22, 1874, and filed his lien claim on January 18, 1875. He began his suit on March 19, 1875, and this was finally determined on January 2, 1884, in a judgment to the following effect: The plaintiff recovered the amount

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claimed in his petition, with a lien under the act approved March 21, 1873, "for the whole amount of the damages assessed in his favor as aforesaid, on and against the railroad of said St. Louis Tunnel Railroad Company and its property," etc. It was further found that the plaintiff's lien was prior and superior to the lien of the trust deed above mentioned, except as to such amounts as were shown to have been advanced on the faith thereof, prior to the 22d day of March, 1873, with commissions and interest; and that, as to all other amounts, the trust lien was subsequent to the plaintiff's. It was thereupon determined from the evidence that the trust lien priority amounted to $485,000 (being the equivalent of £100,000 sterling) with interest and commissions, etc. Then followed an award of special *fieri facias*, in usual form.

It seems to be conceded that the trust lien should prevail to the extent of all advances made by the beneficiaries before the act of March 21, 1873, went into effect. Our ruling with reference to this act merely adds £50,000 value to the equity of redemption, if the circuit court rightly held that this was open to the plaintiff's execution. But on this point, also, we find ourselves compelled to take a different view from that held by the learned judge of the trial court. We think that the foreclosure and sale shown in the record vested a complete title in the purchaser, unencumbered by the lien claimed for the plaintiff.

In the case of an ordinary common-law mortgage, no absolute ownership can be acquired by the mortgagee, or any purchaser claiming under his right, without a decree of foreclosure in equity. Such a decree, upon obvious principles, binds nobody having any interest in the property, who is not a party to the proceeding. This is the utmost, for the purposes of the present controversy, that can be gathered from *Haynes* v. *Beach* (3. Johns. Ch. 459), and other adjudications which are strongly urged upon our attention by able counsel, in the plaintiff's behalf. But the

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courts and the profession have long been familiar with a class of mortgage securities which foreclose themselves, without the intervention of any court. Such are mortgages and deeds of trust with a power of sale in the grantee. The instrument proclaims upon its face how, for the purpose of satisfying the debt secured, an absolute title may be acquired against all the world. Registration makes the method known, with its ordained results, to all the world; so that no claimant of rights arising after that fact may dispute a title perfected in conformity with the conditions of the original deed. This is familiar law, and needs only a direct application to the case before us.

The trust deed of January 1, 1873, directs that, in the event of certain defaults specified, "the said trustees may thereupon, * * * proceed to make sale of the said premises, or so much thereof as may be necessary to pay the amounts then due on said bonds. Such sale shall be made at public auction to the highest and best bidder therefor, at such public place in the city of St. Louis as the said trustees may determine. Notice of the time and place of such sale shall be published at least once a week for six weeks previous thereto, in daily newspapers printed in the cities of St. Louis, New York, and London, and whenever and however else shall be required by law. Upon the completion of such sale, the said trustees shall convey to the purchaser by a good and sufficient deed all the said premises conveyed by these presents.

"*Fourth.* Nothing herein contained shall be construed to limit the right of the trustee, or any holder of any of said bonds, upon default being made in the payment of the interest or principal thereof, or in the performance of any agreement in said bonds contained, to proceed by suit or action at law or in equity, to enforce payment and satisfaction thereof. And any and every sale made under and by virtue of these presents, or of any judgment or decree of foreclosure thereon, shall be absolute and without redemption,

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and shall be a perpetual bar at law and in equity, to all claims and rights of said company of, in, and to said premises and each and every part thereof; and said company hereby waives all right of redemption, valuation, and appraisal of the same under laws of the state of Missouri, now or hereafter in force, in order that an absolute and perfect title may be made to the purchaser thereof on such sale. And the purchaser on any such sale shall not be bound to inquire into the necessity or expediency thereof, or to the application of the proceeds thereof by said trustees."

The record shows that, in January, 1878, Tracy, sole trustee, filed a cross bill in the United States circuit court, reciting, among other things, the trust deed above mentioned and the facts constituting sundry defaults of the tunnel company, and praying for a decree of foreclosure and sale according to the terms of the deed. The result of this proceeding was a decree which, after reciting the stipulations of the trust, the default, and the amount of the indebtedness, with other matters pertinent, appointed Ezekiel K. Woodward a special commissioner to sell the mortgaged property upon the notice, and in every particular of time, place, and manner, in exact accordance with the directions contained in the deed. As appears by his report, and the recitals in his deed to the purchaser, the commissioner followed these directions to the letter, and so sold and conveyed the property, as already stated. It thus appears that everything was done that the trust deed required to be done, in order to make a sale and conveyance "absolute and without redemption," "a perpetual bar at law and in equity," and "in order that an absolute and perfect title" might be made to the purchaser. It may be said that there was a departure from the deed, in the intervention of a commissioner appointed by the court, to do what was devolved upon the trustee. But this in fact was no departure, and if it were one, it would make no difference in the result. Much stress is laid by learned counsel on the fact that

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the sale was made under a judicial decree of foreclosure, instead of upon the personal motion of the trustee. The fact makes no difference whatever. The judicial decree, as an eligible alternative in the option of the trustee, was as much a specific feature in the methods prescribed by the trust deed, as was the advertisement in a London newspaper. It was a part of the plan agreed upon to accomplish an intended result. How could it concern that result, when both methods were offered in the alternative, whether the sale and conveyance were brought about by the will of the trustee alone or by an order of court procured by his instigation, and upon his prayer, in literal accordance with the same plan? The permission given for a resort to the court necessarily involved a consent to its ordinary modes of procedure. The appointment of a special officer to carry out its decree in the forms prescribed was, on the face of the deed, in contemplation of the parties.

It could not have been expected that the court, in the proceeding provided for, would appoint the plaintiff trustee, a party on the record, to execute its judgment. The effect of the transfer, as "absolute and without redemption," was attached by the plain terms of the deed to "any and every sale made under and by virtue of these presents, or of any judgment or decree of foreclosure thereon."

Here is no case of an ordinary mortgage which simply conveys property with a defeasance of title upon the payment of a debt. By ancient and modern usage, such an instrument is considered as leaving open certain questions of fact to be determined by a court of equity, before the grantor can be absolutely deprived of his property. Is the debt still due; and if so, in what amount? How much of it has been paid? Has there been a default, or is the debt not matured? These and other vital questions are referred to no arbitrament designated by the instrument. They belong, therefore, to the courts. Litigation and adjudication must settle them, and so the settlement binds none but parties to it. But all these

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incidents are foreign to a deed like the one shown in this controversy, which in various ways selects and appoints the arbiter and agent for both parties, who is first to decide upon a demand for action, and then to consummate the absolute transfer for which the deed itself has distinctly prepared the way. In the first class of cases, the judicial decree is the prime mover and efficient cause of the final transfer. The mortgage, utterly helpless without it, figures as little more than an auxiliary. In the second class, the deed itself conveys the property absolutely, through agents and instrumentalities of its own appointing. That such was the effect given to the deed in this case by the able and careful judge of the United States circuit court, is manifest from the form of his judgment. This declares: "That in default of and unless, etc., * * * said St. Louis Tunnel Railroad Company and the other defendants in this suit, and all persons claiming by or under them, or either of them, subsequent to the commencement of this suit, and all other persons not parties to this suit who, having liens or claims on said mortgaged premises by or under and subsequent judgment or decree, either as purchasers or encumbrancers, or otherwise, do stand absolutely debarred and foreclosed of and from all equity of redemption of, in, and to the said mortgaged premises, property, and franchises; and that the said railroad, its tunnel and the property and appurtenances, together with the franchises of the said St. Louis Tunnel Railroad Company described and included in said mortgage or deed of trust * * * be set up and sold," etc.

The plaintiff made his contract and entered upon the work with full notice, on the face of the recorded deed, of all these possibilities. There was no more need of his being a party to the formal proceeding in court, than there was of his participating in any other instrumentality for divesting the property, whereof he was warned by the registration. There is sometimes heard a suggestion of hardship in the

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possibility of a contractor's losing the fruits of his labor, in the wresting from him of the very property which that labor has brought into being, for the benefit of the mortgage bondholders. It should be remembered that the bondholder has already furnished the money which was to compensate the contractor, and can hardly be responsible for its failure to reach him. Each party consents that the fund be intrusted to the skill and fidelity of the corporation managers, for the just compensation of the one, and the perfecting in the completed work, of an available security for the other. If by any means these purposes fail, the respective rights of the parties must be adjusted by established rules of law. *Qui prior est in tempore, potior est in jure.* Little need be said about the validity of a mortgage upon property not yet existing, to secure bondholders by means of whose advances the property is to be created. The judgment below sustains it in this case, and the plaintiff, in asking for an affirmance, concedes the correctness of that ruling. The zeal and industry of the defendant's learned counsel has furnished us with many authorities to like effect, and we believe it to be the law. Our statute expressly authorizes railway corporations to issue bonds for work to be done on their roads, secured by mortgage on the whole structure; and we are not to suppose that the legislature intended to introduce a class of valueless securities. Rev. Stats., sect. 765.

The judgment of the circuit court is reversed, and a general judgment will be entered here for the amount of the plaintiff's money demand against the tunnel company ascertained below. All the judges concur.

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PADDOCK-HAWLEY IRON COMPANY, Appellant, *v.* ISAAC M. MASON, Respondent.

December 23, 1884.

OFFICERS — SHERIFF — ATTACHMENT — INDEMNITY BONDS — DAMAGES — TRESPASS. — A sheriff who, under a writ of attachment seizes personalty which is claimed and a bond given under the act of 1855, and which is sold by order of court pending the attachment suit which, on trial, is dissolved, is not liable to the claimant for damages in trespass. The remedy is an action on the indemnity bond.

APPEAL from the St. Louis Circuit Court, HORNER, J. *Affirmed.*

W. B. HOMER, for the appellant: Dissolution of the attachment leaves the property as if it had not been seized. — Rev. Stats., sect. 446; Drake on Attach., sects. 290, 411; *Rancher* v. *McElhinney*, 11 Mo. App. 434. The property should, therefore, at the final dissolution of the attachment, be given to the plaintiff herein, and, therefore, the plaintiff should have had judgment for the proceeds of said sale.— *State to use* v. *Fitzpatrick*, 64 Mo. 185; Drake on Attach. sect. 426. The sheriff's and marshal's act has no relation to the facts of this case. There is here no claim for damage or injury sustained on account of any levy or sale, but simply a claim that after the dissolution of the attachment it was the duty of the sheriff to return the attached property to the defendant in the attachment suit or to his assignee. — Sess. Acts of 1855, p. 464, sect. 5, or Rev. Stats. 1555; *Clark* v. *Brott*, 71 Mo. 473; *Rancher* v. *McElhinney*, 11 Mo. App. 434; Rev. Stats., sect. 446.

KRUM & JONAS, for the respondent: The claimant's remedy is on the indemnification bond. — Special Act of 1855, sects. 4, 5, p. 464; *Bradley* v. *Holloway*, 28 Mo. 152, 153; *St. Louis, etc., R. Co.* v. *Castello*, 28 Mo. 379; *s. c.* 30 Mo. 124; *The State ex rel.* v. *Watson*, 30 Mo. 122; *The State ex rel.* v. *Doane*, 39 Mo. 50.

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LEWIS, P. J., delivered the opinion of the court.

The Seymour Manufacturing Company sued D. T. Sheahon by attachment. The present defendant, as sheriff, seized certain property under the writ, and the present plaintiff claimed ownership thereof, whereupon the attaching plaintiff gave bond under the "sheriff's and marshal's act" of 1855. An order of sale was made under the Revised Statutes (sect. 424, 425), and the property was sold for $938.13. On trial of the plea in abatement, the attachment was dissolved and the suit dismissed. This is an action against the sheriff to recover the proceeds of the sale, the plaintiff claiming a conveyance of the property from Sheahon, before the levy. Upon the facts a judgment stated was rendered for the defendant.

The act of 1855 provides: "When said sheriff or other officer aforesaid shall take an indemnification bond as aforesaid, with good and sufficient security, he shall not be liable to such claimant for any damage or injury sustained by such claimant in consequence of such levy or sale under or by virtue of such execution or attachment." This provision is conclusive against any recovery by the plaintiff in the present proceeding. As a general rule, the dissolution of an attachment leaves the attached property and its ownership where they were before the institution of the suit. But where a question of remedy is concerned, a plain statutory rule must prevail over any general theory of ownership, with the consequent right of action for its vindication, if the statute and the theory disagree. The present action is clearly an attempt to make the sheriff liable to the plaintiff, as a claimant of property levied on and sold under attachment, for damage and injury sustained in consequence of such levy and sale. Had the plaintiff made no claim under the act, the authorities here cited for him would be in point, and the theory of his action sustainable. As matters stand, his remedy for action, if he has one, is against the attachment plaintiff and his sureties.

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It is provided in the act of 1855 that, when a sale is made, as in this case, "the proceeds of such sale shall be paid into court or otherwise disposed of as the court or judge may order." We are not advised why the plaintiff did not, at the conclusion of the attachment cause, apply for an order directing the sheriff to pay over to it the money held by him subject to the court's order. The plaintiff could then have proved the conveyance from Sheahon, and the sheriff would have had a proper warrant for disposing of the proceeds of the sale accordingly. But without some such proceeding, the sheriff had no authority to treat the money otherwise than as the property of the attachment defendant. It came into his official hands as such, and he had no jurisdiction to try and determine adverse titles. The judgment is affirmed. All the judges concur.

R. T. SANDERS, Appellant, *v.* GEORGE G. UTT, Respondent.

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December 23, 1884.

TRADE-MARK — PROPRIETARY RIGHT TO A TRADE NAME. — A dentist doing business in St. Luis may acquire a proprietary right to the use of the words "New York Dental Rooms," to describe his place of business.

APPEAL from the St. Louis Circuit Court, ADAMS, J.

Reversed and remanded.

C. P. & J. D. JOHNSON, for the appellant. Although the name as used by appellant is not strictly speaking a trade-mark, yet it comes within the rules applicable to trade-marks and will be protected as such. — *Gamble* v. *Stevenson*, 10 Mo. App. 581; *Filley* v. *Fassett*, 44 Mo. 178; *McCarthy* v. *Garnhart*, 45 Mo. 595. It is apparent that the respondent appropriated a portion of appellant's trade-mark for an unlawful purpose — that is, for the purpose of deceiving the public and defrauding ap-

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pellant. This being the case appellant is entitled to be protected against the piracy, even though the word pirated is a geographical name. — Codd. Dig. T. M. Cas., sects. 723, 730; *Lee* v. *Haley*, 18 W. R. 242; Cox T. M. Cas., 26, n. 2 and 184, n. 1; *Mclean* v. *Fleming*, 96 U. S. 245; *Lee* v. *Wolf*, 15 Abb. Pr. (U. S.) 1.

GEO. D. REYNOLDS and CHAS. W. HOLTCAMP, for the respondent: "New York" is a geographical name and can not be exclusively appropriated by any one. — Brown on Trade-Marks, sects. 182, 183, 185, 186, to 193; *Ibid.* 495, 500; *Stokes* v. *Landgraff*, 17 Barb. 608. "New York," when used to designate the nature of the article, not a valid trade mark. — *Colonial Life Assu. Co.* v. *Home and Colonial Life Assu. Co.*, 33 Beav. 548; *Brooklyn White Lead Co.* v. *Masury*, 25 Barb. 416; *Canal Co.* v. *Clark*, 13 Wall. 311. "Dental" is a general name; no one can acquire property it it. — *Choynski* v. *Cohn*, 39 Cal. 501; Brown on Trade-Marks, sects. 100, 161, and cases *supra; Edlestone* v. *Vick*, 23 Eng. L. & Eq. 51. The difference between the two names is a substantial one, not merely colorable, and so marked as to avoid deception to even the most careless. Hence no infringement nor fraud on plaintiff. — *Pursar* v. *Brain*, 17 L. J. Ch. 141; *Colton* v. *Thomas*, 2 Brew. 308; *Partridge* v. *Menck*, 2 Sandf. Ch. 622; *Brooklyn White Lead Co.* v. *Masury*, 25 Barb. 416. The plaintiff does not come into court with clean hands. It is for him to allege and prove that the name "New York" is not deceptive. — *Manhattan Med. Co.* v. *Wood et al.*, 108 U. S. 218.

LEWIS, P. J., delivered the opinion of the court.

The plaintiff is a dentist, practicing his profession in the city of St. Louis. His petition states that, for about twelve years past, he has kept over the entrance to his place of business a sign bearing the words "New York Dental Rooms," and adds other particulars of fact which are suf-

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ficient to vest in him a proprietary right to those words, as descriptive of the place where his business is carried on, if the words themselves are capable of being held in such a right. It is further stated that the defendant is carrying on the business of dentistry at a place about nine squares from the plaintiff's and has adopted a sign similar in appearance to that of the plaintiff; bearing the words "New York Steam Dental Company," and in other ways employs the same words in advertising his business and practice. That the defendant thus deceives and misleads the public into the belief that his place of business is the one occupied by the plaintiff, and has thus defrauded and still continues to defraud the plaintiff of his rightful profits and patronage. Plaintiff prays that the defendant be enjoined and restrained from carrying on his business in the name of "New York Steam Dental Company," and from employing the words the "New York" and "dental" or either of them, in any combination of words, for the purpose of advertising his business of dentistry, and for other relief. The circuit court sustained a demurrer to this petition.

As to the supposed lack of resemblance between the names or titles used by the parties, respectively, there is nothing material to be considered. The resemblance is closer than what has appeared in many cases where the phrases employed were held to involve unlawful infringements. *Edelston* v. *Edelston*, 1 De G. J. & S. 185; *Dixon* v. *Crucible Co.* v. *Guggenheim*, 2 Brews. 321; *Potter* v. *McPherson*, 21 Hun., 559; *Electro S. Co.* v. *Levy*, 59 How. Pr. 469; *Roberts* v. *Sheldon*, 8 Biss. (U. S. C. C.) 398.

The grounds of objection chiefly relied on seem to be, that the words "New York," being a mere geographical designation, and the word "Dental" only a generic term of description applying to a business or occupation, there can be no proprietary right in either, and no infringement in any use of them by a person other than the plaintiff.

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Strictly speaking, this is not a controversy about a trade-mark. A very able writer on the subject seems to be of opinion that no accurate definition of the term "trade-mark" has ever been recognized by a competent authority. Brown on Trade Marks, ch. III. However this may be, it seems to be understood that a trade-mark must be a sign or indication of some sort, placed upon an article or commodity, in order to distinguish it as the manufacture or production of a particular person. The present case concerns rather the "good will" of the plaintiff's business, and so resembles the case of *Chovnski* v. *Cohen* (39 Cal. 501), which was a controversy over the right to use on a sign the words "Antiquarian Book Store." The distinction, however, is of little consequence, since the rights of the parties, respectively, are closely analogous in the two classes of cases.

To say that a geographical name can never be used in proprietary right as a trade-mark, states the rule far too broadly. When such a name is employed in connection with the place of manufacture or production, no person manufacturing or producing at that place can monopolize it against other persons manufacturing or producing at the same place. Thus, in *Brooklyn W. L. Co*. v. *Masury*, (25 Barb. 416), the plaintiff had for many years marked its merchandise with its corporate name, when the defendant, who also manufactured in Brooklyn, adopted the mark "Brooklyn White Lead & Zinc Company." The defendant was restrained from using the word "Company," since he had no company, and his use of the word was a fraud on the rights of the plaintiff. But it was held that either party had a right to use the words "Brooklyn White Lead," because the manufactures of each originated in Brooklyn. But in *Newman* v. *Alvord* (49 Barb. 588), the controversy was about the word "Akron," which was the name of the village in New York, where the plaintiffs manufactured a cement, or water lime, under the name of "Newman's Ak-

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ron Cement Company." The defendants were engaged in the same line of business at Syracuse, N. Y., and marked their packages "Onondaga Akron Cement and Water Lime." It was held that the plaintiffs had an exclusive right to use the word "Akron," except as against any person manufacturing at the same place. The defendants were therefore restrained from using the word, although it was a geographical name, because they had no factory at Akron. There is yet another class of cases in which proprietary rights may be acquired in a geographical name. This occurs where the name is used, not for the purpose of indicating a particular locality as in any way connected with the business, but only as a fancy designation, adopted for the sole purpose of distinguishing the factory, or its business, or the particular persons engaged therein, from all other institutions or persons identified with the same pursuit. *McAndrew* v. *Bassett* (10 Jur. (N. S.) 550), is a case in point. The word "Anatolia" was a geographical name, and was stamped on a certain article of liquorice made by the plaintiff which had acquired a high reputation. It was not intended to be understood, nor was it supposed by any body, that the stamp had any sort of reference to the place or country which the name described. It was employed simply as a fancy designation, for distinguishing the article from other liquorice, and as such was held to be the plaintiff's exclusive property and trade-mark. The principle of this decision bears a precise application to the present case, in so far as it touches the use of the name "New York." No one can possibly understand from the plaintiff's sign that his dentistry is performed in the city or state of New York, or that he intends to inform the public that either of those geographical divisions is in any way connected with the service offered to his patrons. Had he called his establishment the "Chimborazo Dental Rooms," no intelligent person would be likely to associate the designation with a mountain in South America, otherwise than as discovering

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where the proprietor had found a fancy name wherewith to distinguish his place of business from others of like character. We think, therefore, that the petition sufficiently shows a proprietary right in the plaintiff to the title "New York," as descriptive of his professional abode, and an unlawful infringement of his right by the defendant. To this extent, therefore, the demurrer should have been overruled.

Not so, however, with the word "dental." That is a generic term, descriptive of a kind of business, and is properly open to all who may choose to engage in such a pursuit. As well might one claim an exclusive property in the term "dry goods," or "groceries," or "tailor's shop." The defendant had a clear right to the use of any apt generic expression which would indicate the nature of his occupation, while he might not encroach upon another's selection of a mere arbitrary symbol having no such descriptive office, but being employed to distinguish an individual among a community of operators in the same line. *Chovnski* v. *Cohen*, 39 Cal. 501. The judgment is reversed and the cause remanded. All the judges concur.

HENRIETTA HEIDEGGER ET AL., Respondents, v. ATLANTIC MILLING COMPANY ET AL., Appellants.

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December 28, 1884.

1. MECHANIC'S LIENS — FIXTURES. — Bolting cloth which is made to form a part of the essential machinery of a flouring mill may, when placed in the mill, be a part of the freehold and subject to a mechanic's lien.
2. —— PRIOR INCUMBRANCES — SALES THEREUNDER. — Such a lien will attach only to the improvements, where the land has been sold under a prior incumbrance.

APPEAL from the St. Louis Circuit Court, HORNER, J. *Reversed and judgment.*

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OVERALL & JUDSON, for the appellants.
HUGO MUENCH, for the respondents.

LEWIS, P. J., delivered the opinion of the court.

This is an action to enforce a mechanic's lien upon the defendant's mill, for bolting cloths furnished by the plaintiffs. The cause was submitted to the court, without a jury, upon the following agreed statement of facts: —

1st. "That the several capacities of plaintiffs and defendants with regard to partnership, incorporation, and trusteeship, respectively, are as in the petition in this case alleged."

2d. "That the defendant, Atlantic Milling Company, was prior to December 11th, 1882, the owner in fee of the real estate in said petition described, and prior to said date, began the erection of the building thereon, designed, and afterwards used as a flouring mill, and subsequently, to wit: on said 11th day of December, 1882, executed to the other defendants the deed of trust, as in said petition also alleged."

3d. "That during the erection of said mill building, and on or before the 16th day of January, 1883, but after the execution and recording of the said deed of trust, plaintiffs upon the one side, and the milling company, through its president, George Bain, on the other, entered into the agreement to have plaintiffs furnish for said mill the material, bolting cloths, in said petition mentioned; and that the several amounts and dimensions of bolting cloths were, in consequence of said contract, furnished on the several dates, and at the prices in the account mentioned, which is filed with the petition in this case, and the same used and applied by said milling company as hereinafter more specifically set forth; and are now still in said mill building, and in use."

4th. "This bolting cloth was sold by the yard, and was by plaintiffs cut and prepared in sizes to fit the bolting-reels

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in the mill, as hereinafter described, delivered in bundles on the dates stated, and taken by the milling company, and tacked tightly to said reels, making them ready for use in sifting flour in the process of manufacture."

5th. "The reels to which this bolting cloth was attached are hexagonal in shape, from 16 to 18 feet in length, by 30 inches in diameter, and 96 inches in circumference. Each of these reels, covered with this bolting cloth, is connected by wheels and shafts and belting with the machinery and steam power of the mill. There were forty-two reels in the mill, and they all were fitted with different sizes of bolting cloth, of different degrees of fineness, to operate together in making the different grades of flour manufactured in the mill, and these bolting reels thus covered with bolting cloth, are an essential part of the machinery for making of flour."

6th. "These bolting reels are inclosed in wooden chests, some holding two and some four reels, and one or more reels may be disconnected from its connection with the machinery of the mill, and removed without injury to the mill building."

7th. "The bolting cloth may be removed by extracting the tacks by which they are fastened, but they are not ordinarily removed unless worn out or injured, and their ordinary lasting quality is from one and a half to two years. When the mill is idle for a considerable time it is customary to take off the cloths from the reels to clean them and pack them away to keep off moths."

8th. "Plaintiffs filed their claim for lien and suit in due time, and if entitled to a lien for said materials, are entitled to interest from date of filing the same."

9th. "On 4th day of April, 1884, under the power of sale in the deed of trust mentioned in petition, the property described in petition, and herein sought to be charged with lien was sold to F. W. Meister et al. Said purchasers being now in possession of the property."

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The court gave judgment for the plaintiffs, with the lien asked for, against the land and the erections thereon, as described in the petition.

The defendants object that bolting cloths, such as are described in the petition, can not be the subject of a mechanic's lien under the law. They contend that the article does not come up to the requirements of our supreme court in *Graves* v. *Pierce* (53 Mo. 423), where the controversy related to carding machines. "The machinery," said the court, "must be such as is used in the erection of a building, and which will, when placed in the building, erection, or improvement on land, become a fixture, and become a part of the realty, or at least such in the erection of the improvement to be made. * * * Carding machines are not usually affixed to the freehold or realty; they are manufactured and sold as an article of merchandise, and are braced, or otherwise stayed, and are taken down and removed to another building when it becomes necessary by a sale or otherwise, without injury to the building in which they are placed.". We do not perceive that the comparison holds good, as discovered by the learned counsel for defendants, between the two sorts of furnishings here brought into view. The carding machine is in itself a complete working apparatus, which may be transferred from one building to another and used anywhere in connection with a motive power, like a sewing machine, or a wheat fan. It savors in nothing of a permanent incorporation with the realty. But a bolting cloth is an inferior member, so to speak, of the mass of machinery which goes to make up the flouring mill, and this is itself part and parcel of the building erected and necessary for its practical use. True, as the learned counsel say, it may be manufactured and sold as an article of merchandise. But the same may be said about the nuts, screws and bolts which upon being properly fitted become parts of an engine or machine permanently annexed to the realty. So as to

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the other suggested points of resemblance. They may all be correctly identified as such, and yet fail to overcome the essential differences which place the carding machine and the bolting cloth in separate categories. Burr mill-stones may be manufactured and sold as an article of merchandise — may be "taken out and removed when necessary, without injury to the building," and may have some other incidental attributee which learned counsel consider indicative of personalty not subject to a mechanic's lien. Yet it was held in *Wademan* v. *Thorp* (5 Watts, 115), that burr mill-stones furnished like any other part of the machinery, were subject to a mechanic's lien upon the mill. The rule is fairly stated in *Gray* v. *Holdship* (17 S. & R. 413), that "everything put into and forming part of the building or machinery for manufacturing purposes, and essential to the manufactory, is part of the freehold; the wheels of the mill, the stones and even the bolting cloth, are parts of the mill and of the freehold," etc. The mistake in the argument for the defendants seems to lie in its assuming that certain incidents which may pertain to either personalty or realty, are proper tests for discriminating between the one and the other. The learned judge of the circuit court properly overruled the defendant's demurrer to the evidence.

The statute provides: "The lien for the things aforesaid, or work, shall attach to the buildings, erections, or improvements for which they were furnished or the work was done, in preference to any prior lien, or incumbrance, or mortgage, upon the land upon which said buildings, erections, improvements, or machinery have been erected or put; and any person enforcing such lien may have such building, erection, or improvement sold under execution, and the purchaser may remove the same within a reasonable time thereafter." Rev. Stats., sect. 3174. The judgment entered below was erroneous in fixing a lien upon the land, which had been sold under the deed of trust — a prior

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incumbrance. For this reason, the judgment must be reversed, and a judgment will be entered here, confining the lien to the improvements, in accordance with the statute. All the judges concur.

IN RE ESTATE OF JAMES W. HANDFIELD; A. D. WILSON, EXECUTOR, Appellant.

December 23, 1884.

1. **ADMINISTRATION — ADMINISTATOR PENDENTE LITE — COMPENSATION.** — An administrator *pendente lite*, is entitled to the same compensation as are other administrators for the performance of like duties.
2 **EXTRA SERVICES — ATTORNEYS' FEES — EXPENSES.** — Charges for extra services, attorney's fees, and necessary expenditures, are not included in the statutory commissions allowed administrators.
3. **ATTORNEY AND CLIENT.** — That an attorney of an administrator, was also the attorney of a person contesting the will, is no objection to an allowance for his fee, where the administrator and the contestant were not parties to the same proceeding.

APPEAL, from the St. Louis Circuit Court, HORNER, J. *Affirmed.*

EDWARD C. ELIOT, for the appellant.

MILLS & FLITCRAFT, for the respondent.

LEWIS, P. J., delivered the opinion of the court.

James W. Handfield died in November, 1881, leaving a will, under which the appellant, Alexander D. Wilson, was appointed, and became duly qualified as executor. A contest was begun against the will, whereupon the probate court appointed W. H. Stone, administrator *pendente lite*. Mr. Stone qualified with a bond of $10,000, and the court ordered the executor to turn over to him the assets of the estate. This order was never obeyed. The contest was determined in favor of the will, whereupon the letters *pendente lite* were revoked, and, upon the demand of the

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executor, the administrator made his final settlement before the probate court. From this it appeared that he had received no assets, but had incurred necessary expenditures for counsel fees, advertising, and other matters, to the amount of $161.06. This amount was by the court allowed in his favor against the estate. The executor appealed to the circuit court where the claim was allowed for $165.62.

The appointment of the administrator *pendente lite* was expressly authorized by Revised Statutes (sect. 14), and he was thus placed for the time being, as to duties and responsibilities, substantially on the same footing with other administrators, and was entitled to the like compensation out of the estate for duties performed in good faith. Revised Statutes (sect. 229), declares: "In all settlements of executors or administrators, the court shall settle the same according to law, allow all disbursements and appropriations made by order of the court, and all reasonable charges for funeral expenses, leasing real estate, legal advice and service, and collecting and preserving the estate; and as full compensation for their services and trouble, a commission of five per cent on personal property, and on money arising from the sale of real estate. Executors and administrators whose letters are revoked, or who die, and administrators *pendente lite* shall receive such compensation, not greater than above allowed, as the probate court may deem just and proper." Jurisdiction is thus given the probate court to "settle" the administrator's account. It would be anything but a settlement if, as learned counsel contends, the court could look at nothing but the charges against the administrator, under section 49. That section has nothing to say about allowances in favor of the administrator, because these are sufficiently provided for elsewhere. It requires a retiring administrator to "make final settlement," and thus opens the way for the court's plenary jurisdiction given in section 229, to allow "all reasonable charges for * * * legal advice and service,

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and collecting and preserving the estate," with a special provision for the case of an administrator, *pendente lite*. Charges for attorneys' fees, extra services and necessary expenditures have never been considered as covered by the percentage, commissions allowed to executors and administrators. *Hawkins* v. *Cunningham*, 67 Mo. 416.

We see nothing in the point made upon the fact, that the attorney of the administrator, was also attorney for the party contesting the will. It is only when an attorney acts for both parties in the same proceeding, that the law raises such objections as are found in *MacDonald* v. *Wagner* (5 Mo. App. 56), and other authorities referred to. A member of the bar in good standing is always presumed to be capable of guarding faithfully the interests of his client, even though his client's adversary may have given him profitable employment in another case.

The record contains nothing which indicates to us that allowance to the administrator *pendente lite* was in any way uneasonable or improper, or that the court exceeded its jurisdiction in making it. The judgment is affirmed, with the concurrence of all the judges.

JOHN F. PUPKE ET AL., Plaintiffs in Error, *v.* F. A. CHURCHILL, Defendant in Error.

December 23, 1884.

1. **BANKRUPTCY — COMPOSITION — BAR TO ACTIONS. — A composition agreement in bankruptcy which has been violated by the debtor, is not a bar to a recovery, by a creditor, on the original indebtedness.**

2. **—— A composition agreement in bankruptcy, approved by the court and duly recorded, under the terms of which the defendant executed his notes to his creditors secured by a policy on his life, the agreement containing a clause that a failure to pay any note or the insurance premiums should, at the option of the creditor, work a release of the agreement, is not a bar to a recovery on the original indebtedness by a creditor who**

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had refused to accept the composition note which had been deposited in court for him, where the insurance premiums were not paid by the debtor.

3. —— The notes given under such an agreement are not payments until they are actually paid.

4. —— Proceedings in bankruptcy are deemed to be pending after the time allowed the bankrupt for performance of the contract has expired.

5. —— CONCURRENT REMEDIES.—The remedy given by the statute to enforce the composition in the bankrupt court is not exclusive, but merely cumulative.

ERROR to the St. Louis Circuit Court, BARCLAY, J.

Reversed and remanded.

H. E. MILLS, for the plaintiffs in error: A composition to be effectual as a discharge, must be carried out.— *Clark* v. *White*, 12 Pet. 191; *Denny* v. *Merrifield*, 128 Mass. 229; *In re Leipziger*, 18 N.B.R. 267; *In re Nigby*, 20 Fed. Rep. 499; *Robinson* v. *Clement*, 73 Ind. 33; *S. P. Nationa, Bank* v. *Porter*, 122 Mass. 308; *Pierce* v. *Gilkey*, 124 Mass. 300; *Home Bank* v. *Carpenter*, 129 Mass. 1. The composition is not effected as a discharge unless the amount agreed upon is actually paid.— *In re Hurst*, 3 Cent. L. J. 78; *In re Reiman*, 13 N. B. R. 133. Where there has been unreasonable delay there is no reason for sending the creditor into the court of bankruptcy for permission to proceed. The law does not pretend to take away the right to sue for a judgment on the original debt, and proving of claim is no bar to action in state court — *Dingee* v. *Becker*, 8 N. B. R. 508; *Valpey* v. *Rea*, 124 Mass. 99; *Greenwald* v. *Appill*, 17 Fed. Rep. 140; *Seavey* v. *Beckler*, 128 Mass. 471; *Blagvil* v. *Hicks*, 11 Phila. 249.

TRUMAN A. POST, for the defendant in error: The plain, tiff's remedy was by proper proceedings in the bankruptcy court — *In re Bayley*, 19 B. R. 77–78; *In re Mickel*, 19 N. B. R. 377; *Deford* v. *Hewlitt*, 18 N. B. R. 524.

THOMPSON, J., delivered the opinion of the court.

In 1877 the defendant filed his voluntary petition in

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bankruptcy, under the terms of section 17 of the amendatory bankruptcy act, of June 22, 1874, compounded with his creditors on the basis of twenty-five cents on the dollar of his indebtedness, payable in three equal instalments, in three, five, and seven years, giving his notes without interest for each payment, to be secured by certain life insurance policies in the aggregate amount of $50,000, of which the first two annual premiums were to be paid to render them non-forfeiting. The plaintiffs in this action did not assent to this composition agreement. It was recorded, approved by the court, the policies were taken out, the notes were executed, and thereupon the bankruptcy proceedings was, by order of the court, dismissed at the costs of the bankrupt. The notes which the bankrupt was required to execute in favor of the present plaintiffs, under the terms of the resolution of composition were executed by him and tendered to them, but they refused to receive them, and thereupon they were, by order of the bankrupt court, deposited with the clerk. The proposition for a composition, as accepted by a resolution of the creditors and approved by the court, contained this clause: "Any failure on my part to pay the notes or the insurance premiums, according to the terms of this composition, shall, at the option of the creditor, work a release of his acceptance thereof. And a compliance on my part with its terms, shall, on the other hand, work a full discharge and release of my debts."

The present action is brought upon a note of the defendant held by the plaintiffs prior to the bankruptcy and the composition. It was admitted, for the purposes of this trial, "that the insurance aforesaid was not kept up after he first year, and that the instalment notes have not been paid as provided in the composition." Upon this state of case, the court, sitting as a jury, refused a declaration of law to the effect that the plaintiffs were entitled to recover and gave judgment for defendant.

We are of opinion that judgment should have been given

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for the plaintiffs. At common law and in equity a composition agreement works a release of the antecedent debt only when it is performed. *Clark* v. *White*, 12 Pet. 178, 191; *McKenzie* v. *McKenzie*, 16 Ves. 372, 374; *Ex parte Bennet*, 2 Atk. 527. A well understood exception to this rule exists in cases where the original debt is released upon an agreement to pay part of it, accompanied by giving additional security for such part payment. Another exception is admitted where the terms of the composition agreement clearly import that the effect of the making of the composition shall be *ipso facto*, to discharge the original indebtedness.

1. The statute under which this composition was made was imported into our late bankrupt law from the English bankruptcy act of 1869. By its terms, in a case of voluntary bankruptcy, a composition between the debtor and his creditors to the extent of two-thirds in number and one-half in value, would bind the non-assenting creditors, whose debts were included in the bankrupt's schedule, and who had notice of the proceedings. This provision has been justly held in derogation of common right, and hence to be strictly construed. *Re Shields*, 15 N. B. R. 532; *s. c.* 4 Cent. L. J. 557.

Where the debtor surrendered his property, and it was applied under the bankrupt law to the satisfaction of his debts he received from the court a discharge which, with certain exceptions, protected him against actions for his antecedent debts. But where he compounded with his creditors under the statute now in question, he received no certificate of discharge. The resolution of composition, when approved by the court and recorded, was in itself a discharge, if carried out by the debtor according to its terms. *Smith* v. *Morganstern*, 2 Fed. Rep. 657; *Denny* v. *Merrifield*, 128 Mass. 229, per Gray, C. J.; *Mason & Hamlin Organ Co.* v. *Bancroft*, 4 Cent. L. J. 295; *Re Bjornstad*, 5 Fed. Rep. 791; *Re Becket*, 12 N. B. R. 201. In such a case, no certificate

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of discharge was given, for it was not competent for the bankrupty court, where the debtor had not surrendered his property for the benefit of his creditors, to discharge him from his debts by the giving of such a certificate.

But unless the resolution of composition distinctly imports the contrary, it is clear upon principle and upon an almost unbroken line of authority, that the composition becomes a discharge only when carried into effect by the debtor according to its terms, unless he has been prevented from carrying it into effect by the act of the creditor who seeks to avoid its effects as a discharge. *Edwards* v. *Coombe*, L. R. 7 C. P. 519; *Re Hatton*, L. R. 7 Ch. 723; *Ex parte Peacock*, L. R. 8 Ch. 682; *Goldney* v. *Lording*, L. R. 8 Q. B. 182; *Newell* v. *Van Praagh*, L. R. 9 C. P. 96; *Edwards* v. *Hancher*, 1 C. P. Div. 111; *Whittimore* v. *Stephens*, 48 Mich. 573, 578; *Robinson* v. *Clement*, 73 Ind. 29, 33; *Re Negley*, 20 Fed. Rep. 499; *Mount Wollaston National Bank* v. *Porter*, 122 Mass. 308; *Pierce* v. *Gilkey*, 124 Mass. 300; *Home National Bank* v. *Carpenter*, 129 Mass. 1; *Re Hurst*, 13 N. B. R. 455, 463; *s. c.* 3 Cent. L. J. 78, decision of Emmons, J.; *Re Reiman*, 13 N. B. R. 128, 133, decision by Mr. Justice Hunt; *Re Leipziger*, 18 N. B. R. 267.

Two or three cases which hold the contrary have been pressed upon our attention. One of them purports to be a decision of Mr. Circuit Judge Woods, on a petition in review in bankruptcy. *Re Bailey*, 19 N. B. R. 77. We do not find this decision in the series of decisions of that learned judge reported by himself, and therefore we feel at liberty to conclude that it may have been re-considered by him. Another is a decision of the court of appeals of Maryland, in *Deford* v. *Hewitt*, 49 Md. 51; *s. c.* 18 N. B. R. 518. The latter decision proceeds upon the ground that the giving of notes by a bankrupt in pursuance of the composition agreement were in the nature of payment, and hence, were of themselves a satisfaction of the ante-

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cedent indebtedness. This ground is wholly fallacious. The statute required that the payment under a resolution of composition, in order to be valid, should be "in money," and the giving of notes by the debtor is regarded as nothing more than a convenient form of expressing his obligation to pay money according to the composition agreement. They are in no sense payment, since to hold them so would, as was clearly reasoned by Mr. Circuit Judge Emmons in the case of *Hurst* (*supra*), be to proceed in the very face of the statute. The mere giving of notes has been held, again and again, not to be a performance of the composition agreement. *Re Reiman*, 13 N. B. R. 128, 133; *Re Hatton*, L. R. 7 Ch. 723; *Edwards* v. *Coombe*, L. R. 7 C. P. 519; *Robinson* v. *Clement*, 73 Ind. 29; *Pierce* v. *Gilkey*, 124 Mass. 300.

2. But it is argued that judgment could not have been rendered for the plaintiffs in this action, because exclusive jurisdiction of the proceeding is vested, by the terms of the bankrupt law, in the United States district court. The bankrupt law does not, by its terms, impose a sweeping and unlimited stay upon actions in the state courts. It merely stays them "until the question of the debtor's discharge shall have been determined, provided there has been unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge." U. S. Rev. Stats., sect. 5106. This statute was framed before the amendatory act providing for composition with creditors was enacted, and hence it does not, in terms, apply to such a proceeding in which the bankrupt does not receive a formal discharge. But it furnishes an analogy upon which the courts have made a rule, and that rule is that the proceeding is deemed to be pending in the courts of bankruptcy during the time which is allowed the bankrupt in which to perform the composition agreement; and this, if we except the decision in *Re Bailey* (*supra*), is the utmost limit of the time during which the United States district courts have held

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that they were at liberty to enjoin actions in the state courts. *Re Hinsdale*, 9 Ben. 91, 97; *Re Nebenzahl*, *Id.* 243, 246. One court has even restricted the period to the date of the approval of the resolution of the composition. *Re Lytle*, 14 N. B. R. 477.

3. The statute under which this composition was effected provides for a summary proceeding in the bankrupt court by a creditor for the enforcement of the composition according to its terms. It is argued that this proceeding is exclusive, and the reason given for so holding is that it enables the bankrupt court to adjust the equities among all the creditors, and prevent one creditor from getting an advantage over the other creditors by bringing an action at law for his debt, This seems to have been the ground on which Mr. Circuit Judge Woods reasoned in *Re Bailey*, (19 N. B. R. 77). The force of this reasoning is admitted. The same provision existed in the English bankrupt act of 1869, upon which our statute of composition was modeled. But the English courts hold that the remedy there given was cumulative, and not exclusive; and so the American courts have held where the point has been brought to their attention in several of the cases above cited. The reason and justice of the case seem to favor this conclusion, especially as applied to the facts of the case before us. Here, the agreement of composition was broken by the debtor after the first year, by allowing the life insurance policies to lapse and become forfeited. A non-assenting creditor is now told that, on the happening of this event, he might have gone into the bankrupt court and proceeded against the debtor for a summary process as for a contempt. What good would this have done him? Suppose it might have ended in an order committing the debtor to jail until the composition agreement should be complied with. Is there any reason to believe that this remedy would have been effective? Would he have been more likely to earn money to pay the life insurance premiums in jail than out of jail?

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This contention of the defendant allows him to say to the plaintiffs this: "I can go into bankruptcy and get a sufficient number and value of my creditors to assent to a composition agreement. I can break the agreement the next day, and you, although you never assented to the agreement, have no other remedy than to compel me to perform an agreement to which you never assented, by putting me in jail." We hold that this is not the law.

4. But all doubt upon this question is cleared up by the terms of the composition agreement itself. It will be remembered that additional security was given in the form of the life insurance policies. This, if accepted without any expression of a contrary understanding, might, according to the common-law rule, have worked *ipso facto*, a discharge of the antecedent debts of the assenting creditors. But they were cautious to express in the agreement that it should not have this effect, by making the debter agree as follows: "Any failure on my part to pay the notes or the insurance premiums according to the terms of the composition shall, at the option of the creditor, work a release of his acceptance thereof." By the very terms of this agreement any assenting creditor is, upon the facts stipulated, at liberty to make his assent, and for stronger reasons a non-assenting creditor is not to be held bound. The agreement then stands, as to another creditor who may now dissent, as though it had never been made. And is a dissenting creditor who has indulged his debtor for nine years, almost until the bar of the statute of limitations had attached, to be now told that his remedy is to go into the court of bankruptcy and prosecute the bankruptcy proceedings? Those proceedings, we have seen, were dismissed in 1877. Could they now be re-instated? If they could be, what would the creditor gain? What complications would not surround the matter after such a lapse of time? If this contention is true, it was within the power of a debtor, by going into voluntary bankruptcy and getting a composition

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with his creditors, and by breaking the terms of the composition agreement, to harass them indefinitely in pursuit of their just demands.

The judgment is reversed and the cause remanded. Judge BAKEWELL concurs; Judge LEWIS is absent.

M. D. LEWIS, ADMINISTRATOR, Respondent, *v.* JAMES O. CARSON ET AL., Appellants.

December 23, 1884.

1. ADMINISTRATION — RENTS AND PROFITS. — An administrator who has taken charge of the realty of an estate is liable on his bond for the rents and profits thereof.
2. —— DUTY TO DISCHARGE LIENS. — It is the duty of an administrator who has taken charge of the realty of an estate with the consent of the devisees, to pay the taxes and make repairs thereon.
3. —— WASTE. — In an action against an administrator and his sureties for waste, he is entitled to credit for money paid, with the approval of the probate court, to discharge liens against the estate and for which he had been given credit in his settlements with the court.
4. —— UNCOLLECTIBLE ACCOUNTS. — In such an action the administrator should, in the absence of further proof, be allowed credit for accounts returned by him in his settlements as uncollectible.
5. —— RESIDUARY DEVISEES. — An administrator need not charge himself with money received by himself and others arising from the sale of their interest as residuary devisees in land sold during the administration.
6. —— NOTICE — LIS PENDENS. — A purchaser of realty sold by an administrator without an order of the probate court takes it with notice of pending suits and subject to claims which may be established against the estate by a judgment therein.

APPEAL from the St. Louis Circuit Court, HORNER, J.

Reversed and remanded.

E. T. FARISH, for the appellants: The proceeds of sale of the real estate with which the administrator charges himself, are not assets. The rents collected by him are strictly in the same category, since he is liable to the devisees for these rents. — *Ferguson* v. *Carson*, 13 Mo. App.

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29; *Rodman* v. *Rodman*, 54 Ind. 444–447; *Hawkins* v. *Kimball*, 57 Ind. 42; *Terry* v. *Ferguson*, 8 Port. 500; *Goodrich* v. *Thompson*, 4 Day, 215; *Griffith* v. *Beecher*, 10 Barb. 432; *Stone* v. *Zimmerman*, 21 Port. 394.

LEONARD WILCOX and H. A. HAEUSSLER, for the respondent: The Webb purchase-money was assets for which the administrator is liable. — *Dix* v. *Morris*, 1 Mo. App. 95; *s. c.* 66 Mo. 518; *Campbell* v. *Johnson*, 65 Mo. 439; *Boyer* v. *Allen*, 76 Mo. 498. The administrator properly used money of the estate to pay off mortgage debts. — *Lake* v. *Meier*, 42 Mo. 389; *Ross* v. *Julian*, 70 Mo. 209, 212; *Evans* v. *Snyder*, 64 Mo. 516; *Greene* v. *Holt*, 76 Mo. 678; *Cape Girardeau* v. *Harbison*, 58 Mo. 90; *Church* v. *McElhinney*, 61 Mo. 542. And to pay taxes on the real estate. — *Wilcox* v. *Smith*, 26 Barb. 337; *McElhinney* v. *Church*, 61 Mo. 543; *Gray* v. *Clement*, 12 Mo. App. 579; *Burdyne* v. *Mackey*, 7 Mo. 374, 375. And to pay special taxes. — *In re Motier's Estate*, 7 Mo. App. 514, 518; *Higgins* v. *Ausmuss*, 77 Mo. 351. And for repairs and insurance. — *Byrd* v. *Governor*, 2 Mo. 102; *Ritchie* v. *Withers*, 72 Mo. 559. The burden of proof was upon defendants to show that inventoried assets were uncollectible or worthless. — *Julian* v. *Abbott*, 73 Mo. 580; *In re Haffey's Estate*, 10 Mo. App. 232; *Williams* v. *Heirs of Petticrew*, 62 Mo. 471; *Folger* v. *Heidel*, 60 Mo. 288; *Wilcox* v. *Smith*, 26 Barb. 354; *Shultz* v. *Fulver*, 11 Wend. 361, 365; 3 Williams on Ex. (6th Am. ed.) 1863.

BAKEWELL, J., delivered the opinion of the court.

This was an application to the probate court by the administrator *de bonis non* of John B. Carson, to ascertain the amount of moneys and property of the estate which ought to be in the hands of the former administrator upon a legal settlement, and for judgment for such amounts against such administrator and William F. Ferguson, one of the sureties upon his bond, and for execution to enforce said judgment. The petition specially sets up seventeen

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items of credits taken by the former administrator in his settlements, to which it is claimed he was not entitled, amounting altogether to $32,141.44. Ferguson filed an answer, setting up in full the facts afterwards introduced in evidence, and claiming that the estate is indebted to him for a sixth class demand, and that otherwise all debts, demands, and legacies are fully paid.

On hearing, the probate court found that the amount due by the former administrator at the date of the revocation of his letters, was $8,752.53, and rendered judgment accordingly. On hearing anew in the circuit court, the finding was for the same amount with interest, and the judgment was, therefore, for $9,080.73.

Whilst the proceeding was pending, Ferguson died, and the cause was revived against his administrator.

The testimony, with the exception of that of defendant Carson in his own behalf, was entirely documentary. The only testimony introduced by defendant was this evidence of Carson, and a deed from himself and wife and Jane U. Postlethwaite and husband to Webb.

It appears from the evidence that the will of John B. Carson was made on the 13th of July, 1866, and proved on the 6th of August following. This will is as follows: —

"I give and bequeath to my nephew, John B. Carson, my gold watch and chain; to my niece, Ellen B. Carson, my diamond ring; to my step-daughters, Caroline P. Smith and Ann Eliza Smith, each the sum of twenty-five hundred dollars; to my nephew, Norman Bruce Carson, one thousand dollars; these three legacies to be paid as soon as practicable by my executor, and if necessary for that purpose, he may sell all of my real estate to pay them. All the rest and residue of my estate, real, personal, and mixed, I devise and bequeath to my brother James O. Carson, and my sister, Mrs. James H. Postlethwaite, of Somerset, Pa., the same to be equally owned and enjoyed by them and their heirs forever. Having assigned my profits

in the business of the house of J. B. Carson & Brother, from 31st December, 1865, to my sole partner and brother, James O. Carson, I hereby direct my executor to respect that assignment, and to ask no account of the business since January 1st, 1866. I hereby appoint Judge William F. Ferguson, executor of this, my will."

James O. Carson was appointed administrator *cum testamento annexo*, and gave bonds on the 30th of October, 1866, in the sum of $50,000, with William F. Ferguson, Cornelius Vorhies, Hugh Boyle, and William Ballentine, as sureties.

The inventory was filed in due time by the administrator. It shows that the estate consisted of the following property: Various lots and tracts of ground in St. Louis, as follows: A tract of two and fifty-two hundredths acres on Grand Avenue, in which deceased has an interest of an undivided three-fourths in fee; one hundred and thirty feet on Washington Avenue, bounded east by Leffingwell Avenue; one hundred and fifty feet on De Kalb Street, corner of Douchouquette; lot 38, in block 27, Stoddard Addition, corner of Locust Street and Leffingwell Avenue, incumbered by deed of trust for $4,000 and interest. Also one-third interest in one hundred and nineteen acres on the Meramec river, and a quit-claim of all the interest of Josiah Dent in a lot in St. Louis. Also, the following personal property: —

An undivided half interest in the machinery and fixtures of the Missouri Cotton Factory and of the partnership effects of the firm of Marriot & Co. One hundred and fifty-five shares in fourteen different banks, business associations, hotels, railroads, etc. Some stock not yet issued in certain petroleum companies. The watch, chain, and ring mentioned in the will. Five promissory notes of various persons, amounting with interest to about $900. Book accounts on the ledger of deceased embracing twenty-eight names, and amounting to about $32,000.

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At the March term, 1868, Carson made his first annual settlement, in which he charges himself with $17,096.33 and takes credit for $18,183 paid out, showing a balance in his favor of $1,086.67. At the September term, 1869, as we judge from the printer's bill for the advertisement, — at any rate in 1869, — Carson made his second settlement, after notice as required by law for a final settlement. This settlement was intended to be, and was accepted as, and seems to have complied with, the conditions of a final settlement. It showed a balance due the administrator of $5,636.12, upon making it the administrator was discharged. In this settlement, the administrator returns as of no value various stocks remaining unsold, and also returns as of no value all the bills payable and all the book accounts, with the exception of the account of E. C. Coulton for $565, which is stated to be "of some prospective value." The other names are returned, as to most of them, as discharged bankrupts, and, as to all of them, as entirely worthless.

The items in the two settlements may be summarized as follows: -

To proceeds of sale of $2^{52}/100$ acres on Grand Avenue	$17,750 00	
To received from Marriott, surviving partner of Marriot & Co., on final setment in probate court	10,326 33	
To proceeds of sale of stocks. . . .	4,770 00	
To dividends received on stocks . . .	200 00	
To rents collected	1,692 59	
To personalty	107 50	
The credit items may be summarized as follows: —		
By costs of probate court and administration		$99 70
By funeral expenses		371 00
By allowed demand of Turney . . .		88 49
By legacy tax		457 00

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By taxes delinquent	$157 45		
By general, 1866-7-8 . .	1,951 62		
By taxes special	1,363 52		
By taxes state and county, personal.	23 62		
By taxes state; income . .	123 00		
By taxes on bank stock. . .	79 90		$3,699 11
By repairs to realty			155 95
By insurance, realty			36 00
By assessment of Laclede Race Association stock			867 90
By assessment of other stocks . . .			247 05
By commissions paid broker selling stocks			27 20
By special legacy paid Carrie Smith. .			5,000 00
By special legacy paid N. B. Carson .			1,000 00
By paid in full settlement of suit *Allegheney Bank* v. *Carson, deceased*, in St. Louis circuit court			1,191 44
By attorney's fee and expenses in same suit			295 10
By paid to extinguish deed of trust on Locust Street property			4,740 00
By paid to extinguish deed of trust on Grand Avenue property			3,100 00
By commissions on sale of Grand Avenue property — discount on notes for purchase-money and deeds. . .			728 00
By purchase of 1/4 of Grand Avenue property of Hannon under decreé of court, and recording deed			3,001 25
By paid to Mrs. Postlethwaite as residuary legatee			5,900 00
By paid to James O. Carson as residuary legatee			7,500 00
By commissions of administrator. . .			1,927 26
To balance carried down		5,636 03	
		$40,482 45	$40,482 45
By balance due administrator. . . .			$5,636 03

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During the lifetime of John B. Carson, suit had been begun against him in the St. Louis circuit court by Ober and others, which culminated on March 30, 1874, in a judgment against his administrator. This judgment was affirmed in the supreme court of Missouri; and the cause having been, on March 27, 1876, taken by writ of error to the supreme court of the United States, the writ of error was, in that court dismissed on January 5, 1879. The original judgment was for $15,941.80, on which a credit had been entered of $10,826.00. This judgment was assigned to Glover, who, in 1879, began proceedings in the St. Louis circuit court to set aside the final settlement of James O. Carson. In these proceedings the settlement which had been made as a final settlement was set aside, and the judgment of the federal court allowed against the estate of John B. Carson for $5,114.94, and placed in the sixth class. James O. Carson was ordered to give a new bond as administrator, and, failing to do so, his letters were revoked on January 15, 1883, and, on application of James O. Carson and the other devisee of J. B. Carson, the public administrator, in obedience to the order of the court, took charge of the estate, and began the present action.

On behalf of defendant it was admitted that James O. Carson, if present, would testify that he paid the Smith and Carson legacies of $6,000, as shown by the vouchers; and also to Mrs. Postlethwaite the $5,900, as shown by vouchers; and to himself $7,500. These two payments being made to them as residuary legatees. That he deemed it his duty as administrator to pay the two deeds of trust upon the real estate, and therefore paid the notes thus secured amounting to $7,840, and obtained releases of the realty. That he paid, as per vouchers filed with his settlement, to James O'Connor, for legal services in defending suits against the estate, $1,191.44; and that, on June 18, 1867, he, James O. Carson, and wife, and his sister, Mrs. Postlethwaite, and her husband, sold and conveyed to Webb

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the two and one-half acres on Grand Avenue for $17,750, as already stated. The deed to Webb was also introduced, and is a warranty deed.

This was all the testimony.

The court, at defendant's instance, gave a declaration of law to the effect that, if James O. Carson, as administrator, paid O'Connor $1,191.44 for legal services, as stated, and the same was reasonable for the services rendered, defendants are entitled to a credit for this payment.

The court refused declarations of law asked by defendants to the effect, (1) that if Carson, as administrator, paid $6,000 as special legacies, defendants are entitled to credit therefor; and (2) that "if Carson, as administrator," etc., paid and discharged liens or incumbrances on the real estate belonging to deceased, and the same was a benefit to said estate, and prevented the real estate from being sold under said liens, then these defendants are entitled to a credit for the amounts paid as aforesaid.

The court then gave judgment for plaintiff, as has been already stated.

Some of the questions which have been discussed in the briefs of counsel have already been disposed of in this court in the progress of the litigation arising out of the fact of the attempt to make final settlement of the Carson estate whilst an action against the administrator was still pending on appeal.

Ferguson having purchased the Ober judgment through the intervention of a trustee, and being thus subrogated to the rights of the plaintiff in that judgment, began proceedings by a bill in equity to subject the parcels of real estate sold by Carson and Mr. Postlethwaite, the residuary devisees, to the payment of this allowed demand. We held that the final settlement having been set aside, the probate court became repossessed of the administration of the estate, and that it is the proper tribunal to enforce a demand against the estate; and that the circuit court had no orig-

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inal jurisdiction to decree that the allowed demand should be a lien on the realty; and that the sale by the heirs and devisees of Carson did not oust the probate court of jurisdiction to enforce against the realty thus sold a demand allowed against the estate. *Ferguson* v. *Carson*, 9 Mo. App. 497.

Then an application for sale of the realty having been made by Ferguson as assignee of the Ober judgment, and having been refused by the probate court, we held that Ferguson, though surety on the appeal bond, might purchase this judgment in the name of another, and have an order of sale of realty to pay the same; and that the sale by James O. Carson and Mrs. Postlethwaite was made under no power in the will, and passed nothing but the interest of the grantors, subject to claims against the estate; and, further, that the administrator erroneously credited the estate with the proceeds of these sales, which were in no sense assets of the estate. *Ferguson* v. *Carson*, 13 Mo. App. 29.

The theory upon which the learned judge of the probate court went, in ascertaining the assets in the hands of the first administrator for which he was held liable to his successor, is indicated by the instruction refused, but is more fully set forth in the written opinion handed down by him on announcing his judgment (which was affirmed by the circuit court). This was made part of the briefs of counsel; and the very high respect which every judge of this court entertains for the learning and experience, especially in matters of probate law, and for the high judicial qualities of that judge, to which I seize this opportunity of testifying in this, the last opinion to be written by me as a judge of the St. Louis Court of Appeals, — has led us to examine that opinion with great attention.

After a brief and comprehensive glance at the history of the litigation, Judge Woerner says: "The law regulating this proceeding is found in sections 48 to 54 of the Revised

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Statutes, and provides that an administrator whose letters are revoked shall account for, pay, and deliver to his successor all money, real, and personal property of every kind, and all rights, credits, deeds, evidences of debts, etc., etc., at such time and in such manner as the court shall order on final settlement of such administrator. The court having jurisdiction shall ascertain the amount of money, etc., in the hands of such administrator as came into his hands and remain unaccounted for.

"Under this law it seems to be clear that the administrator removed is liable to account to his successor, not only for all assets remaining in his hands unadministered at the time of his removal, but also for all assets that he has improperly administered. That he has illegally administered or wasted the assets can not be held to show that he 'accounted for' such assets in the meaning of the above section. He is then liable in this proceeding for all assets which were once in his hands, and which are not shown to have been legally administered, that is, applied in the manner required by law. And, since the payment of legacies in derogation of the rights of creditors is a *devastavit*, he must be held to account to his successor for such amount of the legacies he may have paid as may be necessary to pay debts.

"Although the court of appeals held that the personalty was not sufficient to pay the debts, its announcement of the law is consistent with the above view. The conclusion of the insufficiency of the personalty was reached after striking out the credits for amounts paid for legacies. The decision of the court of appeals is also in consonance with the prevalent American doctrine (following the common law where not modified by statute) that, without an order of court directing the administrator to take charge of the real estate for the purpose of selling or leasing it to pay debts, it is no part of his duty or authority to meddle with it in any re-

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spect. The proceeds of the sale of the real estate with which the administrator charges himself are held not to constitute assets. The rents collected by him are strictly in the same category. Since he is liable to the devisees for these rents (see *Rodman* v. *Rodman*, 54 Ind. 444, 447; *Hawkins* v. *Kimball*, 57 Ind. 42; *Terry* v. *Ferguson*, 8 Port. 500; *Goodrich* v. *Thompson*, 4 Day, 215; *Griffith* v. *Beecher*, 10 Barb. 432; *Stoner* v. *Zimmerman*, 21 Pa. St. 394), it would be unjust to charge him as administrator.

"It follows that, in the present proceeding, the former administrator will be held liable for all unadministered property of the estate, and for all legacies paid in derogation of the rights of creditors, to the extent to which it may be necessary for the payment of debts now remaining unpaid, and the necessary costs arising; and that he is not liable for the rents or proceeds of sale of real estate, nor entitled to credit for expenses or disbursements in connection therewith, either for repairs, taxes (except such as arose from possession in the lifetime of the testator), or for disincumbrance.'

"The items of the administrator's account which must be changed in consequence of this ruling, are: Proceeds of sale of real estate, $17,750; rents, $1,692.50, must be struck out on the debit side; expenses of real estate for repairs, taxes, and incumbrances discharged $14,431.85, and legacies paid, $19,400, which are to be deducted from the credit side. This will change the balance in the administrator's settlement in his favor, to a balance against him of $8,752.53, a sum sufficient to pay all the debts and expenses now due, or that will probably arise before the final winding up of the administration.

"It is not neccessary to pass on other questions suggested on the trial, because the liability of the former administrator is limited to the amount which may be necessary to pay unsatisfied debts and the incidental expenses. He

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is not liable on this proceeding for any improper payment of legacies, taxes, etc., if not needed for the above purposes."

There is no doubt of the general principle — and it has repeatedly been recognized, both by the supreme court and by this court — that realty passes to the heir, who may enter as soon as descent is cast, and that the rents and products belong to the heirs and are not ordinarily the subject of administration.

The cases cited above from Indiana and other states are in accordance with the statutory provisions of those states alluded to in the opinions. In Indiana the administrator inventories only the personalty, and his bond is so framed as to cover his acts in regard to personalty alone. *Hawkins* v. *Kimball*, 57 Ind. 42. So in the New York case, cited above (*Griffith* v. *Beecher*, 10 Barb.), it is said that the administrator has no power over the real estate beyond that given by statute, and that the rents accruing after the death of the intestate are not assets in the administrator's hands. But it is held in that case that where the administrator mistakenly supposed that the rents were assets, and on this assumption paid some simple contract debts out of them he will not be thereby estopped from setting up the truth as to the surplus, and insisting when called to account by a simple contract creditor, that the moneys thus received were not assets. In the case from 4 Day (*Goodrich* v. *Thompson*, *supra*), the court says the heirs might enter as soon as descent is cast, *if the estate was solvent*, and that the rents and profits belong to the heirs. The case from Alabama (8 Port. 500) was one in which the administrator sued as such to recover the rent of land of the intestate which the administrator had allowed the defendant to occupy. Plaintiff recovered, and the court in affirming the judgment says (the italics are those of the writer of that opinion) that: "The duties of an administrator do not require or even authorize him, *in the ordinary course of administration*, to

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exercise a control over the real estate of his intestate, yet, if he assumes to lease it, he will hold the rent in trust for those legally entitled." The Pennsylvania case (*Stoner* v. *Zimmerman, supra*) is merely to the effect that, to effect a conversion of land into money under the terms of a will the power to sell must be absolute and unconditional; and that where the interest of the devisee has been improperly sold by the executor, the devisee may waive the tort, and recover back the money from the administrator of a claimant to whom the executor erroneously paid it. We do not perceive that any of these cases lay down any general rule as to the matter here in controversy differing from that announced in Missouri. "But," says Chief Justice Shaw, in *Wilson* v. *Shearer* (9 Metc. 508), "when the rents and profits of real estate have been received by the administrator with the consent of the heirs, they have been regarded to some extent as assets. At all events it gives the administrator a lawful possession and a good title against all except the heirs." In *Kimball* v. *Sumner* (62 Me. 309), the court says: "The probate court does not necessarily have any jurisdiction over the rents. The administrator neither has the right against the consent of the heirs, nor is he required, to occupy the estate or collect rents therefrom. He may receive the income of the real estate by the consent of the heirs, or with their acquiescence. He would not be regarded as a trespasser in so doing, unless done in opposition to their interests or indifference of their wishes. It is often convenient and sometimes of decided advantage for him to do so, as where the heirs are minors without guardians, or are abroad or are unacquainted with the management of affairs, and where the administrator may be himself an heir, or having intimate business or family relations with the estate, and in other cases. In many cases there is an understanding or agreement that the administrator shall take the rents and account for them as assets for the benefit of the estate, where such a course may save a sale of the

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real estate for debts, or where the heirs get the advantage of them in the general distribution. In such case, the administrator would account in the probate court for such assets with the general assets according to such agreement, but not necessarily by force of any requirements of the statute. Such we believe to be the somewhat common practice."

In Massachusetts formerly the administrator was not required to inventory the realty, and it was held that the heirs are entitled to the rents and profits until the realty is sold for the payment of debts. *Gibson* v. *Farley*, 16 Mass. 279. However, Mr. Rand, the learned annotator of these reports, remarks in a note at the end of this case: "As the real estate left by persons deceased is now required to be inventoried by the administrator and is made assets in his hands for the payment of debts, it would seem most agreeable with the spirit, if not with the letter of the law, that the rents and issues of such real estate, by whomsoever they have been received after the death of the intestate should be holden in trust and liable for payment of the debts of the deceased as far as they are wanted for that purpose."

So in *Almy* v. *Crapo* (100 Mass. 220), it is held that, though it is no part of the duty of an administrator to take charge of real estate, and whether he does so or not, creditors are not entitled to require him to account for the income, yet he may receive the rents with the acquiescence of the heirs; and, when it is uncertain whether the estate will be otherwise solvent, it is convenient that he should do so. But, that when the administrator is also heir or devisee, and there is no ground to charge him with the rents except that he is also administrator, he will be presumed to have entered as heir, if that is most for his advantage.

In Missouri it is made the duty of the administrator to inventory the real estate; he may lease it for short terms, under direction of the probate court; he may sell it by

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appropriate proceedings, to pay debts and legacies, where the personalty is not sufficient for this, and it is specially provided that "whenever the court shall be satisfied that any real estate need not be sold or leased for the payment of debts of the estate, the executor or administrator shall be ordered to deliver possession of the same to those entitled to it." Rev. Stats., sect. 130, 70, 129, 146.

It has been held by this court, that in Missouri, the realty is not ordinarily assets. (*Re Huckstep*, 5 Mo. App. 582. But we have also held that rents collected by the administrator, which he is not bound to collect, are assets when collected; that, if the administrator leases the realty without authority, and receives rents, these rents, when received, will nevertheless be assets, and he must account for them; that, where there was no order of the probate court to deliver the realty to the heir, and the administrator has leased without authority, the rents are assets when collected by him, for the proper administration of which the sureties of the administrator are liable; and that, where the estate is unsettled, and perhaps insolvent, the devisee can not recover rents so collected by the administrator (*Gamage* v. *Bushell*, 1 Mo. App. 419), and that moneys received by the executor, proceeds of the sale of realty by the executor under a power unduly exercised, are assets for the sale of which the sureties are liable. *Dix* v. *Morris*, 1 Mo. App. 93.

It is well settled in this state, that whilst it is a general principle, that realty descends to the heirs, and the administrator has nothing to do with it, yet, when as a matter of of fact, he does retain charge of it, and collects the rents, he is to account for them to the probate court, and his sureties are liable. *Gamble* v. *Gibson*, 59 Mo. 585; *Dix* v. *Morris*, *supra; s. c.* 66 Mo. 514. *Byrd* v. *Governor, etc., to use* (2 Mo. 102), was an action against the surety on an administrator's bond. It was agreed that judgment should be entered up against

the surety for the waste, in favor of each creditor of the estate, in proportion to the amount wasted, and that the surety might make use of any equitable defence he had. The waste was established. It was then shown that the intestate had dug and walled a cellar on a city lot belonging to him; that, after his death, the widow and administratrix, before the estate was declared insolvent, built a brick house on this cellar wall, at an expense to her of $1,300. She was then removed as administratrix, and defendant appointed *de bonis non*. He applied for an order of sale of realty; and, under the order, sold all the realty, and the improved lot in question, which lot brought $750; which he paid to creditors of the estate. The lot with the cellar and without the building erected by the administratrix, was worth only $100. On appeal, the judgment of the circuit court was reversed, and the surety allowed an equitable credit for the additional value given to the lot by the building; the supreme court holding it to be inequitable that the creditors should receive the improved value of the estate, and also the assets wasted by the improvement. Judge Tompkins dissented, holding that, both at law and in equity, the expenditure of the money, by building on the estate was waste, as much as if the house had been erected by the administratrix on the land of a stranger.

There can be no doubt, we think, that, where the administrator, with the tacit consent of the heirs, no application to the probate court having been made according to the provision of the statute (Rev. Stats., sect. 130), by any one interested, for an order on him to deliver possession of the realty to those interested, and no such order having been made — as, if he receives the rents and profits, he must account for and distribute them under the supervision of the probate court, so also, under the same supervision, he should pay taxes, cause necessary repairs to be made, and keep the realty from going to destruction in his hands, so far as that is reasonably practicable.

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There can be no doubt, that, strictly speaking, an administrator in Missouri can not apply the personalty to pay special taxes for improvements of the realty which taxes accrue after the death of the intestate; and that he may be refused credits in his settlements for such tax bills. *In re Motier's Estate*, 7 Mo. App. 518; *Higgins* v. *Ausmuss*, 77 Mo. 351. But executors and administrators stand in the position of trustees for those interested in the estates which they administer, and in their management generally are liable only for want of due care and skill such as prudent men exercise in the management of their own affairs. Thus, where a testator left, among other property, a hotel in full operation, which he held under a lease for a term of years; his widow, who was the executrix and a devisee to the extent of one-half of the estate, was unable to dispose of the hotel except at a great sacrifice, and she continued to run it for more than a year, though at a constant loss; at the end of that time, she disposed of it by sale, at a very large advance upon its appraised value; but a portion of this purchase-money turned out to be uncollectible. In all this matter, she acted without any order of the probate court. It was held by the supreme court, that, as it appeared that she acted in good faith, and did what she considered to be for the best interest of the estate, she ought to be credited for the rent paid, and also for that portion of the purchase-money which she had been unable to collect, and to be charged with the rents and profits arising from the sale; and, as the estate was benefited in the end by the course which she had pursued, however irregular, it was held to be "grossly inequitable" and "too harsh an application of the doctrine ordinarily applicable," to charge her with the actual loss, and let the estate reap all the benefit for her skill, care, and management. *Merritt* v. *Merritt*, 62 Mo. 150.

In the case at bar, the executor, together with his sister, were the residuary legatees of an estate supposed to to abun-

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dantly solvent. He took charge of the realty without any opposition from any one interested in the estate, and with the tacit consent, at least, of his sister, to whom, together with himself, and subject to the debts and special legacies, all the realty of the estate was devised. He collected the rents and charged himself with them; he paid taxes, general and special, to preserve the estate; he paid special bequests out of funds of the estate in his hands, and thereby stopped the running of interest. At the time he took charge, an action was pending against the estate, of which he and everybody concerned had notice. He seems to have acted with prudence and judgment and good faith. It would appear that, neither he, nor the purchasers of the realty entertained much apprehension as to the result to the estate of the pending suit. At any rate, instead of keeping the estate open to await the result of it, and allowing it to be eaten into by accumulating interest, he made, within three years, a settlement meant to be final, and made upon the usual notice. In this settlement, and in his previous annual settlement, all his dealings with the estate are fully set out. No objection is interposed by any person, and his accounts and vouchers are passed upon and approved by the probate court. Pending the administration, and whilst the other suit is pending, the executor and his sister, the sole residuary legatees, and devisees of the real estate of deceased Carson, convey with warranty a parcel of land which had been devised to them by the testator Carson. The purchaser at this sale took with his eyes open, and with notice, and assumed the risk that, if the Carson estate should prove insolvent, or if it should be necessary to have recourse to the realty, this land might be subjected to payment of debts of the estate and special legacies. Fourteen years after the last settlement of the executor, in the interests of the representatives of these purchasers, an attempt is made to re-open the settlements of the administrator, and to hold the sureties upon his bond liable for a

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misapplication of the personalty and a *devastavit*, on the grounds that the Webb purchase-money was assets; that the mortgage debts of the estate were improperly paid by the executor; that the payment of legacies to special and residuary legatees must be disallowed; that the payment of special tax bills must be disallowed; that all payments for repairs of realty were illegal; and that the executor should be held now, after the lapse of fourteen years, to show affirmatively, in this proceeding, that the accounts which he returned as uncollectible with the approval of the probate court at the time, were really bad,

This is not a proceeding by any one interested in the estate as heir, distributee, or creditor, to falsify and surcharge the settlements. *Prima facie* they are correct. There can be no doubt from the vouchers in evidence that all money for which the administrator took credit was really paid out by him. He took charge of the realty according to a practice which has prevailed in Missouri. He himself and his sister Mrs. Postlethwaite were alone interested in the preservation of the realty. The allowed demand against the estate was less than $100. The special legatees were interested only to the amount of their legacies, which the administrator has paid. No one applied to the probate court to have the real estate turned over to the heirs or devisees, so far as it was not needed to pay legacies. No one except Mrs. Postlethwaite and her brother, the administrator, who were the devisees, was interested in the realty. Mrs. Postlethwaite was evidently a non-resident.. She is described in the will as residing in Somerset County, Pennsylvania, and it appears that the deed to Webb was acknowledged by her in that place in June, 1867. She interposed no objection to the management of the realty by her brother, the administrator; and he was manifestly the only person to take charge of and preserve it. The case is that suggested in *Kimball* v. *Sumner* (*supra*), where it is manifestly convenient and advantageous that the adminis-

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tor, being himself an heir or devisee, or the heirs being abroad, the administrator should have charge of the realty and receive the rents. Conclusions of law to the effect that the administrator, as such, has no concern with the realty, if it is not needed to pay debts or legacies; that the probate court may, under the statute, where this is the case, on application, order that the administrator deliver possession of the realty to the heirs or devisees; and that an administrator may, on the objection of those interested in the estate as creditors or heirs, be refused credit for money paid by him for taxes, are not decisive of the present case. Here, the administrator who paid the taxes, and his sister, were sole residuary legatees; and the realty was devised to them subject to debts, legacies, and liens. The reasoning of the court in the *Motier Case* (*supra*), as to the payment of special taxes, that the heirs might perhaps effect a compromise of the claim, does not apply to the case at bar. The realty was subject to sale, under section 146 of the administration law, for the payment of any legacies which the personalty was insufficient to pay. The payment of these special legacies stopped interest upon them, which might begin to run at six per cent, after the estate had been in administration one year. Rev. Stats., sec. 243.

We think that the payment of the special legacies should be allowed. The payments for repairs, insurance, and general and special taxes, were made with the sanction of the probate court at the time, were for the preservation of the estate, and the credits in the two annual settlements should not now be disturbed as to them. The same may be said as to the money paid to satisfy deeds of trust which were a lien upon the realty.

We have already decided that the Webb purchase-money was not assets of the estate. The commissions on sale of Grand Avenue property, the discount of the notes for this sale, the purchase-money paid Harrison, the two payments to the residuary legatees, should all be disallowed. It will

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appear on turning to the account stated at a former page of this opinion, that this will leave the balance in favor of the administrator something over $5,000. The assessments paid for stocks, the commission for selling them, the legacy and personal tax should be allowed, and the settlements need not be disturbed as to them. This leaves in doubt only the credit for attorneys' fees and settlement of the suit of *Allegheny Bank* v. *Carson*, as to which, we see no reason why they should be disallowed; but, as that is quite immaterial, and the balance will be largely in the administrator's favor, even if they be stricken out, we need not consider them. The commissions should be reduced to correspond with the actual money on which the administrator will appear to be entitled to his commissions when the accounts are corrected.

As to the objection that the administrator is not entitled to credit for the accounts and stocks reported as worthless, because he has introduced no evidence as to their value, in this proceeding, we see nothing in that. The burthen was, doubtless on him; and it is to be presumed that he satisfied the court in this respect when the settlement, accepted as a final one, was passed upon. It is not pretended that any of these accounts were collectible, or that any of the stocks unsold and returned as worthless, were of any value.

These disbursements, for which the administrator has obtained credit, seem all, with the exceptions noted above, to have been such as a prudent trustee might have made under the circumstances; and we do not think that they should now be disallowed, for the mere purpose, and with the result, of relieving of its just burdens the realty of the estate, and establishing a large demand against the sureties of an apparently honest administrator and solvent estate.

We think that the judgment of the circuit court should be reversed. It is so ordered, and the cause will be remanded to the probate court to be proceeded with in accordance with the views announced in this opinion. Judge THOMPSON concurs. Judge LEWIS absent.

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JOSEPH HEIL ET AL., Respondents, *v.* ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Appellant.

January 20, 1885.

1. **COMMON CARRIERS — DAMAGES — TORTS — ACTIONS EX DELICTO. — An action against a common carrier for damages to goods while in transit, in which no contract of affreightment is set up in the petition, is an action *ex delicto*.**
2. **—— PRACTICE — TAKING CASE FROM THE JURY. — Although in such action it is shown on the trial that the carrier issued to the shipper a bill of lading embodying a limitation of the carrier's common-law liablity, that does not authorize the court in taking the case from the jury.**
3. **—— LIMITATION OF LIABILITY BY CONTRACT. — The statutory liability of a common carrier for damages to goods by the negligence of connecting carriers, can not be evaded by issuing a bill of lading expressing an exemption from such liability.**
4. **—— MEASURE OF DAMAGES. — A stipulation in a bill of lading that the cost of the property at the point of shipment shall govern in the case of loss, does not refer to damage or deterioration while in transit.**
5. **—— The measure of damages for injury to goods while in transit is the difference between the reasonable market value of the goods at the point of destination at the date when they should have arrived and their real value in their damaged condition.**
6. **—— BURDEN OF PROOF. — In an action against a common carrier on his common-law liability for damage to goods in transit, where the carrier sets up a special contract limiting his liability, and proves that the loss occurred by reason of a peril excepted in such contract, the burden of proving the supervening negligence of the carrier, rests with the plaintiff.**
7. **—— INSTRUCTIONS. — A judgment will not be reversed because of the giving of an erroneous instruction as to the measure of damages, where there is no conflict in the testimony as to the elements of damages, and the amount of damages is a mere matter of calculation as to which the jury have not erred.**

APPEAL from the St. Louis Circuit Court, HORNER, J.

Reversed and remanded.

H. G. HERBEL, and BENNETT PIKE, for the appellant.

D. C. HORNSBY, for the respondent.

ROMBAUER, J., delivered opinion of the court.

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This is an action to recover damages occasioned to plaintiffs by defendant's negligence.

Plaintiffs averred in their petition that defendant was a common carrier of goods between the city of St. Louis, Missouri, and the city of Galveston, Texas. That on the 23d day of December, 1879, they delivered to defendant certain packages of apples, potatoes, and onions of the value of $701.81 which defendant as such carrier undertook to convey to Galveston, and deliver to plaintiffs' consignee. That by reason of defendant's negligence, delay, and want of proper care the goods were damaged on their delivery to the consignee to the amount of $514.96 for which amount plaintiffs ask judgment.

Defendant's answer admits the receipt of the goods, but claims that they were received under a special contract of transportation, by the terms of which they were to be conveyed by defendant to Texarkana, Arkansas, the terminal station of defendant's road, and were thence to be forwarded by defendant to plaintiffs' consignee in Galveston. Defendant claims that it had performed said contract.

Defendant's answer further claims that by said special contract plaintiff stipulated: To release defendant from damages caused by delays or change of weather. Not to hold it liable for any damage occurring on any other connecting railroad, and that in the event of the loss of the property the cost of the same at the point of shipment should govern the settlement.

Defendant claims that the damages were caused by an excessive change in the temperature while the goods were in transit.

To this answer plaintiffs replied by a general denial.

On the trial plaintiffs gave evidence tending to show that they delivered the articles in question in good sound condition to defendant in St. Louis, Missouri, on the 23d day of December, 1879, and that their consignee was notified

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of their arrival in Galveston, Texas, on the 5th day of January, 1880. That upon examination then made by the consignee it was found that the articles had been injured by frost. That the goods were properly packed in the cars by the shippers in St. Louis, with safeguards against frost, and could have been transported as packed in the then state of the weather, without any injury.

Plaintiffs also gave evidence tending to show that the cause of the injury was the displacement of the protection against frost, after the delivery of the goods to defendant, and before their delivery to plaintiffs' consignee.

Upon cross-examination of one of the plaintiff's witnesses it appeared that the goods were shipped under a bill of lading, delivered to plaintiffs at date of shipment, — but not signed by them.

There was testimony offered by plaintiffs tending to show the value of the goods at Galveston, in the condition in which they arrived, and also of the market value, at that time and place of such goods in a sound condition, but no evidence was offered by them tending to show, on what part of the route the alleged negligence in handling the goods occurred nor any evidence tending to show any unreasonable delay in the transportation of the goods from St. Louis to Galveston.

At the close of plaintiffs case the defendant demurred to the evidence by instruction, which the court refused.

The defendant thereupon introduced testimony tending to show the cost of the goods in St. Louis at the date of their shipment, the distance and direction of the route from St. Louis to Galveston, and the time ordinarily required for transporting freight that distance, which was from eight to ten days. Defendant also read in evidence the bill of lading issued to plaintiffs, which contains the conditions and exceptions, relied upon as a special contract in defendant's answer.

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This being all the evidence the court, on plaintiffs request, instructed the jury in substance to the following effect: —

That the burden of proof was on defendant to show that the damages were caused by one of the causes excepted in its undertaking, and that the exceptions named were the proximate and sole cause of the loss, and that the damages were not occasioned by want of care, skill, or diligence on part of its employees, and that if the jury found that the goods were damaged by reason of the carelessness, delay, and negligence of the defendant in delivering them to the next carrier at the terminus of defendant's road, then the jury should find for plaintiffs.

Also that, "If the jury find for plaintiffs, the measure of damages is the market value at Galveston, at the time and in the condition, in which they ought to have been delivered, and the amount for which the goods were sold."

The court refused to instruct the jury, on defendant's request, that the burden was upon plaintiffs to show that the damages were caused by negligence of defendant or its employees, while the goods were in transit over defendant's road. And also refused to instruct the jury, that plaintiffs were limited in their recovery to the reasonable market value of the goods in St. Louis at the date of their shipment, less what they sold for in Galveston, and less freight, paid with interest on balance at the rate of six per cent per annum.

There was a verdict for plaintiff for $424.20, which by *remittitur* was reduced to $353.

The errors complained of are. That the court refused to sustain defendant's demurrer to the evidence at the close of plaintiffs' case. That the court misinstructed the jury as to the burden of proof on the question of negligence. That the court misinstructed the jury on the question of damages, and that the damages are excessive.

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The demurrer to the evidence was properly overruled. The action is not one *ex contractu*. If it were, the plaintiffs would have been required to set out the special contract in their petition. *Clark* v. *Railway Co.*, 64 Mo. 446. The plaintiffs in their petition set out the facts out of which defendant's legal obligation arises, the obligation, the breach of it, and the damages resulting from the breach, making it a sufficient declaration in an action on the case founded in tort. *Burnett* v. *Lynch*, 5 B. & C. 609. This point was so ruled in *Clark* v. *Railway Co.* (*supra*), where a special contract executed formally by both shipper and carrier was interposed to defeat plaintiff's recovery, and where the court held that the action was based upon the common-law responsibility of the carrier for negligence, from which no special contract could relieve him. That his liability did not arise from a special contract but in despite of it. That it was not based upon contract express or implied, but upon neglect of a public duty.

The cases decided by the supreme court of Indiana, cited by appellant's counsel, militate against this position, but must yield to the controlling authority of our own court.

Defendant's fifth and sixth instructions were properly refused.

The fifth instruction limits defendant's liability, to damage caused by its own negligence, occurring while the goods were in its possession, and in transit over its own road between St. Louis and Texarkana, and the sixth limits plaintiff's damages to the reasonable market value of the goods in St. Louis at the date of shipment, less the amount they sold for at Galveston, and less freight paid, with interest on the balance. Both these instructions lay down incorrect propositions of law.

The defendant in this case, if under the testimony liable for negligence at all, was liable as well for its own negligence, as for the negligence of any other common carrier, to whom such property was to be delivered or over whose

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line the property was to pass. The bill of lading shows that the property was consigned to I. S. Mitchell & Co., at Galveston, Texas, and guarantees the rates of freight to Galveston. There can be no question under the testimony that both parties to the contract fully understood, that the goods were to be shipped to Galveston, and not to Texarkana, as a terminal point, and the contract expressly provides that the special exceptions from liability contained in it, shall enure to the benefit of all other carriers to whom the goods might be delivered by defendant, at the terminal point of its own railroad.

On the 11th of June, 1879, the legislature passed an act fixing the liability of common carriers, receiving property for transportation, which act was in force when this contract was entered into, and which provides among other things: —

"Whenever any property is received by a common carrier to be transferred from one place to another, within or without this State, or when a railroad or other transportation company issues receipts or bills of lading in this state, the common carrier, railroad, or transportation company issuing such bill of lading shall be liable for any loss, damage, or injury to such property, caused by its negligence, or the negligence of any other common carrier, railroad, or transportation company, to which such property may be delivered or over whose line such property may pass." Rev. Stats. 1879, sect. 598.

This law established a rule of public policy in regard to such contracts, and the carrier who received the goods, or issued a bill of lading, after the law went into effect, contracted subject to its provisions, and could not at pleasure avoid the liability thus imposed upon him, by the easy process of giving a special receipt.

Defendant's sixth instruction is equally faulty. The measure of damages, fixed by the bill of lading, is confined to the "loss of property," and does not cover damages re-

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sulting from its injury. This distinction is established by authority (*Baltimore, etc., R. Co.* v. *McWhinney* 36 Ind. 440; Lawson on Contracts of Carriers, sect. 186), and its reason, outside of the fact that all such clauses are strictly construed against the carrier, is obvious. On what possible theory defendant could claim that the freight which had already been paid, should be deducted even from the market value of the goods in St. Louis, is not conceivable.

The measure of plaintiffs' damages in this case, if they are entitled to recover, is the reasonable market value of the goods in the city of Galveston, less the amount which such goods were reasonably worth then and there in their damaged condition, with interest upon the balance from that date at the rate of six per cent per annum. Freight had already been paid, and could not again be deducted. 59 Mo. 361.

The instruction of the court, touching the measure of damages, given at the instance of plaintiffs is clearly wrong. The verdict, however, is not necessarily erroneous on that account, as the testimony upon which damages were to be computed stands uncontradicted. Where there is no controversy as to the facts the judgment is a mere conclusion of law. There was no controversy of fact here as to the elements composing plaintiffs' damages, and this court could by a simple process of computation determine whether the damages awarded are excessive or not.

There is, however, a serious obstacle to the affirmance of this judgment. The bill of lading, claimed by defendant as a special contract, was read in evidence without objection, defendant's assent to its terms as far as such terms are legally valid, must, therefore, be presumed. That contract excepts a number of perils, and both parties recognize in their instructions the fact that, as to such perils, the liability of defendant is limited. Plaintiffs claim that although the loss occurred by one of the excepted perils, yet if the de-

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fendant's negligence supervened in causing the loss or injury, defendant is liable. This is correct. But plaintiffs further claim, and the fourth instruction given on their behalf asserts, that the burden of proof is upon defendant to establish not only that the loss or injury occurred by one of the excepted perils, but also that it did not occur by defendant's negligence. This is not the law.

The law in this State is settled in conformity with the better authority in other States, that the shipper may sue the carrier on his liability for negligence, in an action on the case, although there is a special written contract of transportation; that in such action the carrier may set up the special contract, and show that the loss or injury occurred by reason of some peril excepted in the contract. Having shown this he is *prima facie* exempt. If the shipper then claims that the exception does not protect the carrier, because his negligence supervened and aided in causing the loss, the burden of proving such negligence is upon him and not upon the carrier. — *Wolf* v. *The American Express Co.*, 43 Mo. 425, 426; *Read* v. *St. Louis, etc., R. Co.*, 60 Mo. 206.

The court, therefore, committed error in giving plaintiffs' fourth instruction, and as that error, under the facts of the case, was prejudicial to defendant the judgment is reversed and the cause remanded to be proceeded with in conformity with this opinion. All the judges concur.

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E. D. JONES ET AL., Appellant, *v.* F. A. DURGIN, Respondent.

January 20, 1885.

1. CONTRACTS — MUTUALITY ESSENTIAL BUT MAY BE IMPLIED. — Although a contract in express terms is obligatory on one party only, yet if it appears therefrom, that the consideration upon which one party assumed

an express obligation, was a corresponding obligation of the other party, such obligation of the latter will be implied.

2. —— WANT OF CONSIDERATION. — But when in a continuing contract the obligation thus to be implied is so vague and indefinite as to be incapable of enforcement, the express obligation fails for want of consideration.

APPEAL from the St. Louis Circuit Court, LUBKE, J.

Affirmed.

PATRICK & FRANK, for the appellants.

MCKEIGHAN & JONES and A. R. TAYLOR, for the respondent.

ROMBAUER, J., delivered the opinion of the court.

The plaintiff and the defendant entered into the following contract: —

"ST. LOUIS, March 11th, 1878.

"I agree to pay the Western Publishing Company for the insertion of my advertisement to the amount of three pages printed matter in its book to be called — 'A Tour of St. Louis, or the Inside Life of a Great City.'

"One cent for each printed page of such advertisement in every volume which may be disposed of to business men, farmers, merchants, etc., in the states of Missouri, Kansas, Arkansas, Texas, and Louisiana.

"F. A. DURGIN."

The plaintiffs claim that they published ten thousand copies of the book containing the defendant's advertisement as per contract, and disposed of them according to its terms. That the defendant failed to pay as he agreed, wherefore they ask judgment for $300.

The defendant by answer denies each allegation of the petition, and sets up the following affirmative defences: —

That the agreement above set out does not contain the entire contract, because it was understood between the parties, at the date of its execution that the book mentioned should be a moral and respectable book, fit for the reading of any one, — and that the book published by plaintiffs was filled with indecency and obscenity, which rendered

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it an indecent and obscene book, unfit to be placed in families. That on account thereof the defendant gave notice to the plaintiff, as soon as the first edition of 500 of said book was published to discontinue his advertisement.

That the contract did not specify the length of time said book might be published, or the number of volumes which the plaintiffs might publish; that the plaintiffs first published an edition of 500 and that the defendant thereupon at once notified the plaintiffs not to insert his advertisements in any more of said books, by which means the contract was determined and ended.

The answer was denied by reply.

The case was submitted to the court, upon an agreed statement of facts, which constituted all the evidence offered in the case of either party, and which is as follows: —

"It is agreed by and between said plaintiffs and defendant as follows: —

"1st. That the defendant signed the instrument of writing dated March 11, 1878. That upon the publication of the first edition of 500 copies of the book mentioned in plaintiffs' petition, and before any other edition of the same was published, plaintiffs made out and presented defendant with a bill of $15, the price of defendant's advertisement in said book for said first edition. Upon the presentation of the same said defendant refused to pay said bill, on the ground that the book so published was immoral and indecent, and was not the kind of book agreed to be published, and at the same time notified plaintiffs not to insert his, defendant's, advertisement in any more of said books, as he would not pay for them.

"That notwithstanding said notice and refusal to pay, said plaintiffs continued to insert said advertisement of defendant in all subsequent editions of said book until 10,000 copies were issued and disposed of.

"Changes were made by plaintiff in the subsequent editions of said book with reference to the alleged immoral parts,

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which changes are marked in copies of said book filed herewith as part of this agreement.

"At the time of signing said writing said book was not written or published, and when defendant was solicited to sign the same he inquired of plaintiffs what kind of book it would be, and the answer was made that the book would be a moral book and fit to be placed on any man's parlor table or in his library. Whereupon said defendant signed said instrument."

A copy of the first edition is herewith filed, marked exhibit "A," with the alleged immoral parts noted; also a copy of subsequent editions filed herewith as exhibit "B," with changes noted.

No declaration of law, or instructions were asked by either party. The court of its own motion made a declaration of law as part of its finding, which is preserved in the record, and to which plaintiffs excepted.

There being no controversy as to the facts it is wholly immaterial whether the declaration of law made by the court was correct or not, as the judgment is a mere conclusion of law upon conceded facts, and the only thing for us to determine is, whether the jndgment of the court under the pleadings and evidence has any support whatever, as such legal conclusion.

It will be seen that the contract in its inception lacked the mutuality of consideration. The defendant agreed that he would pay the plaintiffs a certain sum for the insertion of his advertisements, but the plaintiffs expressly agreed to nothing.

Now, it is true that when a contract upon its face and by its express terms appears to be obligatory on one party only yet if it was manifestly the intention of the parties, and the consideration upon which one party assumed an express obligation that there should be a corresponding and correlative obligation on the other party, such obligation will be implied. *Lewis* v. *Atlas Ins. Co.*, 61 Mo. 534. But in

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such event the obligation to be implied must be a corresponding and correlative obligation and one that can be determined from the face of the contract. No such obligation on part of plaintiffs can be implied here. The defendant could not have compelled the plaintiffs to publish their book or to dispose of it to the parties in the various states named, — nor hold them responsible in damages for not doing so, because assuming that there was an implied obligation on part of the plaintiffs to publish the book and dispose of it, the obligation was so vague and indefinite as to be incapable of enforcement.

This contract falls into the class of contracts which are unenforcible while purely executory, but become valid when executed, because the consideration wanting at first on the one part, is supplied by performance. Upon the performance of the condition by the promisee, the contract becomes clothed with a valid consideration, which relates back and renders the promise obligatory. *Lindell* v. *Rokes*, 60 Mo. 251.

Now in this case, it is agreed, that upon the publication of the first edition of five hundred copies of the book, and before any other edition of the same was published, plaintiffs made out and presented to defendant a bill for $15, the price of defendant's advertisement in said book, for said first edition; which bill defendant refused to pay and at the same time notified plaintiffs not to insert his advertisement in any more of said books, as he would not pay for them.

To that extent the contract was performed by plaintiffs, and defendant could not rescind it. The court so found and rendered judgment for plaintiffs for $15 and interest. The plaintiffs can not claim that the defendant's promise continued, because before they entered upon their new undertaking of getting out another, and as the case finds, corrected edition, and before they had incurred any further expenses in doing so, and at a time when defendant's

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promise was supported by no consideration, the defendant terminated the contract, as we must hold under the circumstances he lawfully might.

The case of *Reade* v. *Bently* (4 K. & J. 656), while not directly in point, does contain one element important for the determination of cases of this character, namely, that the right of determination in such cases must be exercised at a time when the publisher has not incurred further expense in the preparation of a new edition. That the notice of termination was timely in that respect appears affirmatively here.

Judgment affirmed. All the judges concur.

C. S. McMANUS, Appellant, *v.* M. A. GREGORY ET AL., Respondents.

January 20, 1885.

16 375 / 41 51 — 16 375 / 55 25 — 16 375 / 66 324 — 16 375 / 78 395 — 16 375 / 94 389

1. SALES — AUCTIONS — PRIVILEGES. — An auction sale of one lot of real estate with the privilege in the purchaser to take an additional lot is, when the purchaser exercises that privilege, a separate sale of each lot.
2. —— VENDOR'S OPTION OF REDEMPTION — BONUS — CONTRACTS. — Under a provision, in a contract of sale at auction, that the vendor might redeem the property sold by paying a *bonus* of from seven to thirty dollars, the purchaser may demand the larger sum as a condition of redemption.
3. —— SPECIFIC PERFORMANCE — TENDER. — In an action for the specific performance of a contract to convey real estate, where it clearly appears that a tender would have been unavailing, a tender of the purchase-money is unnecessary.
4. CONTRACTS — CONSTRUCTION OF — RESERVATIONS. — Exceptions or reservations in an instrument of writing will be construed most strongly against the person making them, where, with equal reason, they admit of two constructions.

APPEAL from the St. Louis Circuit Court,

Reversed and remanded.

D. D. FASSETT and SIM T. PRICE, for the appellant: The sales were separate. — *Moore* v. *Bonnet*, 40 Cal. 251;

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Southwell v. *Beegley*, 5 Ore. 458; *Jenness* v. *Wendell*, 51 N. H. 66; *Van Eps* v. *Schenectady*, 12 Johns, 436; *Wells* v. *Day*, 124 Mass. 38; *Roots* v. *Dormer*, 4 Barn. & Adol. 77; *Emmerson* v. *Heelis*, 2 Taut. 38. Words of exception or reservation in any instrument are regarded as the words of the party in whose favor the exception or reservation is made. *Lofield's case*, 10 Rep. 106 b; *Donnell* v. *Columbia Ins. Co.*, 2 Sumn. 366–381; 2 Pars. Con. (6th ed.) *505, 507. And they would be construed against such party. — *Cardigan* v. *Armitage*, 2 B. & C. 197; *Bullen* v. *Deming*, 5 B. & C. 842; *Jackson* v. *Hudson*, 3 Johns. 387; *House* v. *Palmer*, 9 Ga. 497; *Jackson* v. *Lawson*, 11 Johns. 191. A tender was not necessary. — *Clarke* v. *Drake*, 63 Mo. 360; *Quinn* v. *Brittian*, Hoff. Ch. 353.

JOHN BOYLE and L. B. VALLIANT, for the respondents.

ROMBAUER, J., delivered the opinion of the court.

The plaintiff brought an action for specific performance of a contract of sale of real estate. The defendant filed a general demurrer to the plaintiff's petition, which the court sustained. The plaintiff refused to plead any further, whereupon the court rendered final judgment in favor of the defendant.

The error complained of is the action of the court in sustaining the defendants' demurrer. The petition is as follows: "Plaintiff for her amended petition herein filed by leave of court, states that heretofore, to wit: on the 21st day of May, 1883, the defendants then were and now are the legal owners of two certain lots of ground in the city of St. Louis and State of Missouri, with a brick dwelling house and certain other improvements on each lot; said lots being more particularly described as Nos, 1511 and 1513 Clark Avenue, block 210, each lot being 25 feet front on Clark Avenue by a depth of 173 feet; the same being valuable property and with the tenement accommodations in the rear and situated on said lots, renting annually for

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about $1,300 for the two pieces of property. That about the same time and before and since said 21st day of May, 1883, Fisher & Co. was a firm, composed of S. J. Fisher, doing a real estate business in the city of St. Louis. That on or about said 21st day of May, 1883, said Fisher & Co. was the duly appointed and legally authorized agent of the defendants to make sale of said two lots and improvements, at public auction and to prescribe the terms therefor and to bind said defendants in all things in and about said sale.

"That on or about May 21, 1883, said Fisher & Co., for and on behalf of defendants, and acting as their duly authorized agent, for the information, use, and benefit of prospective buyers, issued and put forth a printed prospectus or advertising hand-book, setting forth the time and terms of the proposed sale of said property, together with a large quantity of other real estate, which said prospectus among other things, set forth the following terms and conditions of sale, to wit: —

"'TO PURCHASER:

"'The owners of every piece of property listed for this sale having fully determined to sell, thus furnishing an opportunity for purchasers to get bargains, there will not be a by-bid, either by an owner or any one representing him, during the day, as every patron to this sale has given his free and unqualified consent to this arrangement, on account of the privilege granted him as hereinafter mentioned. The owners of every piece listed are more than anxious to realize on their property at once and without delay, although it be at a sacrifice, as seen from the fact of their going to the expense incurred in conducting a sale of this description. There is no (nor will there be) fixed or cut and dried price that any given property must bring, owners being willing to risk the market and purchasers determining the amount to be brought. If, however, any piece of property is knocked down at this sale

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at a price that the owner considers too great a sacrifice, he will have the right, within forty-eight hours after the sale to redeem the same by paying a bonus of not less than seven dollars and not more than thirty dollars.

"'This sum, together with the earnest money, will be turned over to the purchaser and sale declared off, it being the determination to make this sale an open and fair transaction as between buyer and seller. * * *

"'TITLE.

"'Owners vouch that the title to every piece of property offered at this sale is good. All earnest money will be refunded and examiner's fee paid by Fisher & Co., if title is not found in all respects perfect. Full warranty deeds given.

"'TAXES.

"'Taxes of 1882, and all previous years, seller must of course pay. Taxes of 1883 purchaser to deduct one-half the amount from first payment. The deed will then read: *Warrant and defend against claims of all person whomsoever except against taxes for 1883.*

"'TERMS.

"'One-third cash, one-third in one year, one-third in two years, interest on deferred payments six per cent, payable annually, secured by deed of trust on property sold.

DEPOSIT.

"'$30.00 required down on purchase of property on $1,000 or under. $50.00 on sales between $1,000 and $2,000. $75 on sales between $2,000 and $5,000 and so on. That part of each plat colored red is the property for sale.'

"That plaintiff came into possession of a copy of said prospectus or hand-book, and acting on the faith of the offers therein made, attended said advertised sale at the

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time and place designated. That at said sale one of said lots, twenty-five feet by one hundred and seventy-three feet, being No. 1513 of 'Plat No. 29' of said prospectus, and the improvements thereon, were put up at public auction by Lanham & Sutton, the auctioneers, duly and legally authorized by defendants to make said sale, and sale thereof by them made, with the privilege of the purchaser of said lot and improvements taking the other of said lots, twenty-five feet by one hundred and seventy-three feet, being No. 1511 of 'Plat No. 29' of said prospectus, and the improvements thereon, at the same sum and price bid for said first lot and improvements.

"That at said auction sale, plaintiff was the highest bidder for said first lot and improvements thereon, plaintiff's bid therefor being $4,075, and the same was knocked down to plaintiff by said auctioneers for that sum and price. That plaintiff then and there also elected to take said other lot and the improvements thereon for the sum and price of $4,075, and said auctioneers then and there declared plaintiff to be the purchaser thereof, and duly entered on 'Plat 29' of said prospectus, the fact that plaintiff was the purchaser of said respective lots. That plaintiff afterwards paid Fisher & Co., agent of said defendants, the amount of earnest money required, to wit: $50, which deposit was accepted by said Fisher & Co., and the facts entered in due form by said agent of defendants, that plaintiff had become the purchaser of said property.

"That afterwards, and within forty-eight hours after the sale of said property, defendants, through said Fisher & Co., their agent, tendered to plaintiff the sum of $50 earnest money paid by plaintiff, and the further sum of $30 as a bonus, and declared to plaintiff that defendants had elected to redeem the property sold, and would not make deeds therefor. That plaintiff refused to accept said tender, and demanded then and there, of said defendants, deeds for said property, which deeds said defendants again refused to

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give. That plaintiff then was, now is, and ever since has been ready and willing to comply with all the terms and conditions of said sale, and that defendants have ever refused and now refuse to make deeds to plaintiff for said property.

"Plaintiff says, that the premises being considered, she has no adequate remedy at law, and she prays the court to order and direct that said defendants do comply with the terms of said sale, and convey to plaintiff, by good and sufficient warranty deeds, the said two pieces of property above described, and for such other and further relief as to the court shall seem meet and proper."

The demurrer to the petition, raises three questions only: —

1. Was the sale recited in the petition, the sale of two pieces of property.

2. Was the vendor, in order to save his rights to redeem, required to pay the highest bonus mentioned in the prospectus for each piece of property.

3. Is the allegation in the petition that the plaintiff was and is ready and willing to comply with the terms and conditions of such sale sufficient without a specific averment of tender.

If any of these questions are answered in the negative, the plaintiff's petition must be adjudged insufficient If they are all answered in the affirmative the judgment must be reversed.

The first point is free from doubt. Whatever may have been the difference of opinion formerly, the rule is now well settled, that where an estate is sold in separate lots, and one person buys several lots there is a distinct contract of sale for each lot. 1 Pars on Con. (6th ed.) 495; *Van Eps* v. *City of Schenecteday*, 12 Johns. 435; *Wells* v. *Day*, 124 Mass. 38; *Casemajor* v. *Strode*, 2 Myl. & K. 706; *Sevin* v. *Guest*, 1 Russ. 325.

The vendor could have enforced the contract for the sale

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of either of the lots, if the title to the other would have failed (Waterman on Spec. Per. of Con., sect. 396), and it would be a strange anomaly to hold, that the contract was a separate contract of sale for each lot at the option of the vendor, but not at the option of the vendee.

But beyond this it would be a forced construction to hold that two separate lots, each marked and designated by its own number, and each containing separate improvements, are not two "pieces of property."

The second question raises a proposition, much closer but must also be answered in the affirmative. The words of the prospectus are: —

"If however any *piece* of *property* is knocked down at this sale, at a price that the owner considers too great a sacrifice, he will have a right within forty-eight hours after the sale to *redeem the same* by paying a bonus, not less than seven, and no more than thirty dollars." (The italics are those of the court.)

This clause can mean only one of the two things. Either the owner may determine the amount of the bonus, which he is willing to pay, and fix it at any sum between seven and thirty dollars, or that the purchaser may determine the bonus, for which he is willing to part with the advantages of his bargain, and fix it at any sum not exceeding thirty dollars for each piece of property bought. In the absence of any fixed rule governing the interpretation of such reservations, it is evident that there would be equal reason to adopt either construction, and no reason whatever to adopt a third.

But it is a settled rule that words of exception or reservation in any instrument, are regarded as the words of the party in whose favor the exception or reservation is made, and must be construed against such party, where with equal reason they admit of two different constructions. *Earl of Cardigan* v. *Armitage*, 2 B. & C. 197; *Bullew* v. *Deming*,

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5 B. & C. 842; *House* v. *Palmer*, 9 Geo. 497; *Jackson ex dem. Snyder* v. *Lawrence*, 11 Johns 191.

In *Dunn* v. *Spurrier* (3 B. & P. 403), it was held, overruling former cases on that subject, that a lease granted for seven, fourteen, or twenty-one years, was a lease at the option of the lessee for either of these periods, and the same doctrine was reaffirmed by Lord Ellenborough in *Webb* v. *Dison* (9 East 16), that learned judge placing his decision on the ground that since the option in its nature could not be exercised by both parties, it should be exercised by the lessee in preference to the lessor.

We must, therefore, in conformity with settled rules hold, that under the facts stated in the petition the option of fixing the amount to be paid as a bonus for redemption, rested with the purchaser, and that the vendor, to redeem, was bound to tender thirty dollars, for each piece of property sold.

It must be evident on a careful examination, that any attempt to give to this clause a different meaning or construction by the aid of other clauses in the same instrument, would necessarily lead us into that region of conjecture and surmise, which the triers of the law and fact, ought alike to avoid.

If there are any facts, outside of these recited in the petition, showing or tending to show that the vendors' obligations were not as therein shown, such facts are proper matters of defence, and should be shown by answer.

We are of opinion that the law on the third point is likewise with the plaintiff. The plaintiff avers that he demanded deeds of the defendant, which the defendant refused to give, and that he was then ready and willing, and is now ready and willing to comply with the terms of the contract on his part. We are referred to no case which would require him to make a tender, when it is apparent that a tender would be unavailing. The case of *Dieckmann* v. *Dieckmann* (49

Mo. 109), cited by defendant, as far as it bears on this case, sustains plaintiff's position, so do other authorities. See Waterman on Spec. Perf., sect. 446 and cases cited.

All the judges concurring, the judgment is reversed and the cause remanded, to be proceeded with in conformity with this opinion.

R. F. PARK, Respondent, v. G. M. VIERNOW ET AL., Appellants.

January 20, 1885.

1. EVIDENCE — CUSTOM OF TRADE — KNOWLEDGE OR NOTICE. — Evidence of a custom of trade set up to modify a written contract is inadmissible unless it be first shown that it was either known to the party sought to be charged or that it was so notorious that such knowledge may be presumed.
2. —— SECONDARY EVIDENCE — NOTICE TO PRODUCE PAPERS. — Notice given at the adjournment of court to produce papers at the continuation of the trial next morning may be such a reasonable notice as will admit secondary evidence of the contents of the paper.

APPEAL from the St. Louis Circuit Court, BARCLAY, J.

Affirmed.

HUGO MUENCH, for the appellant.

LEONARD WILCOX, for the respondent.

THOMPSON, J., delivered the opinion of the court.

The substance of the plaintiff's case is, that, being the contractor with the board of public schools of the city of St. Louis for the building of an addition to the Lyon school-house, he solicited of the defendants a bid for the doing of the brick work of said addition according to the plans and specifications, and that they gave him a bid in writing, whereby they proposed to do it for the sum of $1,921.06; that he accepted this bid by parol, and notified them to proceed with the work, which they declined to do,

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without alleging any reason therefor; that he thereupon relet the doing of said brick work to one Foster, for the sum of $2,150, which was a reasonable price for the doing of the same; that Foster has completed the work and has been paid therefor by the plaintiff in full, except as to the sum of $219, for which the plaintiff has given to Foster his negotiable promissory note; and the plaintiff accordingly sues for the difference between the defendant's bid and the bid made by Foster upon which he was obliged to relet the work. The action was commenced before a justice of the peace and was appealed to the circuit court, where on trial *de novo* before a jury, the plaintiff had a judgment.

The substance of the defence is, that, as the law does not give a mechanic's lien upon a public school building, there is a custom among sub-contractors of work upon such buildings in St. Louis to require a bond of the principal contractor, unless he is undoubtedly solvent; that the bid which the defendants made was made in view of this custom; that the plaintiff was insolvent; that the defendant offered to do the work in accordance with the bid, provided the plaintiff would furnish a bond to pay them for doing it in accordance with the custom, which the plaintiff declined to do; and that thereupon they notified him that they would not proceed with the work. No other defence was set up. Except as to the custom, there was evidence at the trial tending, on the one hand, to make good the plaintiff's claim, and on the other to make good his defence.

1. The principal question in the case seems to be whether the court was right in refusing to allow evidence of the custom to go to the jury. The tender of this evidence was made in this way: The defendant, Gustav M. Viernow, being on the witness-stand, testified that "there was at the time in question in the city of St. Louis a custom among builders engaged in doing public work, in reference to the requirements of a bond from the principal contractor by the sub-contractor, and the furnishing thereof by the prin-

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cipal contractor, in all cases where he was not of undoubted solvent standing; though in the brick trade generally, such custom was not understood by perhaps over one-third. The defendants asked witness, Gustav M. Viernow, as to what that custom was, to which question the plaintiff objected, which objection the court sustained," etc. It is well settled that, in order that a usage or custom may enter into and affect the construction of a contract, it must be shown to be so general and well established that the parties must be presumed to have had knowledge of it and to have contracted with reference to it. *Martin* v. *Hall*, 26 Mo. 386. It must be either directly known to the parties, or else so general in its character that knowledge of it may well be presumed. *Southwestern Freight, etc., Co.* v. *Stanard*, 44 Mo. 71, 82. Or, applying to this case the language of the supreme court in another case, it may be said that, "if the plaintiff had no personal knowledge that it existed, it would be necessary to show that it was so universal and notorious that it was presumed that all were conversant with it." *Walsh* v. *Mississippi Transportation Co.*, 52 Mo. 434, 438. In this case there was no evidence whatever from which it might be inferred that the plaintiff was acquainted with such a custom, as it was proposed to prove, except general evidence to the effect that he had been since 1856 a builder in St. Louis, and that he was a contractor of this particular work. With regard to the question to what extent such a custom must be shown to have been general, in order to bring presumptive knowledge of it home to the plaintiff, we incline to agree with the learned counsel for the defendants that it was not absolutely necessary to show that the custom was known to all persons engaged in the brick trade in St. Louis. On the other hand, we think it would have been sufficient to show that the custom was general or universal among builders doing public work in St. Louis, and that the plaintiff was a person of this designated class; because many persons might be engaged in the brick

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trade and yet not engaged as builders in the doing of public work, and accordingly they might not be likely to know of a custom peculiar to builders doing such work, although it might be universally known among such builders. In order to admit evidence of the custom in this case, it was obviously necessary to prove as a preliminary foundation, either (1) that the plaintiff knew of the existence of such a custom at the time when he solicited and accepted the defendants' bid; or, (2) that the custom was universal among builders engaged in doing public work in St. Louis; and, (3) that the plaintiff was such a builder. But neither of these three things was shown, or was offered to be shown. It is therefore clear that the court committed no error in refusing to allow the witness to state what the custom in question was, and it equally follows that the court was right in refusing an instruction offered by the defendants predicated upon the existence of such a custom.

2. The plaintiff testified that on the 21st of July, 1882, he left at the office of defendants a written notification that, unless they would commence work on the bid in question on or before the 24th of July, he should let it out to the next lowest bidder, and would look to them for what it might cost him to do the work above the amount which they had bid, and that he kept a copy of this notice. After this testimony had been given the court adjourned until the following day. About seven o'clock p.m., on the same day, the plaintiff served upon the defendants a notice to produce the paper in question at the continuation of the trial on the following day. They did not produce it, and thereupon the court allowed the plaintiff, against the objection of the defendants to read in evidence the copy which he had kept. There was no error in this. Nothing appears to indicate that the notice to produce the paper was not a reasonable notice, or that the defendants were in any way prejudiced by the introduction of the copy. No claim was made by the defendant that such a written notice had not been re-

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ceived by them, but on the contrary, Gustav M. Viernow admits in his testimony that such a paper was received and thinks that he put it in the waste basket.

3. Concerning the instructions, it is sufficient to say that the court put to the jury in terms favorable to the defendants the question whether there was any express understanding between the plaintiffs and the defendants that the plaintiff should furnish to the defendants security that he would pay them for the doing of the work. Concerning this and the other instructions, it is sufficient to say that they were plainly as favorable to the defendants as they could rightfully claim, and that if any error was committed in giving them it was an error against the plaintiff.

The judgment is accordingly affirmed. All the judges concur.

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GEORGE PRENDERGAST, Respondent, v. GOTTLIEB EYERMANN, Appellant.

January 20, 1885.

EQUITY — REFEREES — PRACTICE. — In equity proceedings, the appellate court will review the findings of the referee where the evidence is embodied in the record.

APPEAL from the St. Louis Circuit Court, LUBKE, J.

Affirmed.

A. R. TAYLOR, for the appellant.

W. B. THOMPSON, for the respondent.

ROMBAUER, J., delivered the opinion of the court.

The plaintiff brought this action to establish a copartnership between himself and the defendant in a certain building contract, and for an account. The defendant denied the

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copartnership by answer, and set up four distinct counter-claims. The cause was sent to a referee by consent of the parties, to try all the issues between them, but without any special directions as to the manner of taking the account.

The referee heard the cause and reported to the court in substance as follows: That he found the partnership as claimed by the plaintiff. That upon a statement of the partnership account he found a balance of $1,043.18, with interest, due the plaintiff from the defendant. Also, that he found in favor of defendant and against the plaintiff on the first, second, and fourth counter-claim, and in favor of the plaintiff on the third counter-claim.

The defendant excepted to the report, but his exceptions were overruled, and the court rendered judgment upon the referee's report, in favor of the plaintiff for the sum of $738.91, being the excess of the balance due the plaintiff on partnership account, over the defendant's counter-claim as found by the referee. The defendant's motion for a new trial being overruled, he saved his exceptions to the rulings of the court and brings the cause here by appeal.

The defendant claims here, that the referee in stating the account erred in not allowing him an additional credit of $700, money paid for cement used in the structure, and in not allowing him $1,500 for one-half of the wages paid a foreman. Also, that the referee erred in rejecting the defendant's third counter-claim, amounting to $455, and that the court erred in overruling the defendant's exceptions, which pointed out these errors of the referee.

In order to consider advisedly the objections thus raised by the defendant, it is necessary to determine the functions of a referee in cases of this character.

The defendant maintains that the referee's finding is in the nature of a special verdict. That where the evidence is contradictory, his finding of facts is conclusive, and where the evidence is uncontradicted as to certain facts, he is

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bound to find that fact according to such evidence. This is unquestionably the rule in this state, in all cases where the referee is charged with the trial of facts in common law or statutory actions. *W. Boatmen's Ben. Assn.* v. *Kribben*, 48 Mo. 41. But in cases of purely equitable cognizance, and where all the testimony is before the court, and preserved in the record, the referee's finding at most occupies only the position of a special verdict of a jury in chancery, and the appellate court, as well as the trial court, will examine the entire testimony, and determine the controverted facts upon the evidence reported. *Ely* v. *Ownby*, 59 Mo. 437; *O'Neill* v. *Capelle*, 62 Mo. 207, 208.

Taking this view of the law, we have carefully examined the entire record in this case, not for the purpose of determining whether there is any evidence supporting the referee's finding, but for the purpose of determining, whether the referee's finding, under the evidence reported, as to the matters complained of, is just and proper.

The defendant stands in the position of one who has denied a trust relation, and against whom that relation has been established. There is no controversy concerning the amounts which he received, and for which he is accountable, the controversy is only concerning such of his disbursements as ought to be credited to him as "just allowances." The referee credited him with all disbursements claimed whereof any entry could be found in his books, although the main elements which would make such entries *prima facie* evidence in his favor, namely, that the books were accessible to both partners, and kept more or less under the charge of both, were wanting in this case. Some of these entries are supported by vouchers, others are not. Of the fifteen separate charges for cement, aggregating the sum of $1,659.00 several are unsupported by any voucher, nor can defendant on cross-examination verify them. Yet he claims, because the referee rejected his additional claim of $700.00 for ce-

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ment, for which he produces no account, nor an itemized statement, and for which he has not even an entry in his books, nor a specific claim in his account filed with the referee, the referee committed error in law. The defendant was the sole and exclusive custodian of all the books, papers, and accounts of the firm, and the least that could be expected of him was an itemized account of such expenditures, which he claimed as a just allowance. We think that the referee has dealt with great liberality in allowing credits to defendant, and that he acted properly in rejecting this claim.

The defendant, in the trial court, claimed that the referee erred in rejecting his claim of $4,500.00 for personal services in supervising the work. In this court he claims that the referee erred in not charging the whole cost of a foreman's wages against the plaintiff. Without going into the question whether his objection should be entertained, when made for the first time in this court, we may say that neither of the objections is well taken. The contract provides, "each party to give his time and attention to the work, or to furnish a competent foreman to superintend in his stead." If this is claimed to mean that each party shall give his entire time to the work, then both parties violated their contract obligation, because the evidence shows that neither party gave his entire time. Powell, the superintendent on behalf of the city, who saw the work often while in progress, testifies that he saw the plaintiff as often there as the defendant, and that it was not necessary for either of them to be there. The preponderance of testimony is that the defendant spent more time on the work than the plaintiff, but the testimony furnishes no data by which the referee could have charged the plaintiff any specific amount for time omitted, and as the foreman was not furnished to superintend in the plaintiff's stead, but was employed on joint account his compensation can not be charged against the plaintiff

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The last error assigned is equally without foundation.

The items of the third counter-claim of defendant which the referee rejected are as follows: —

February	11,	1878.	Cash	$105
"	16,	"	"	300
June	22,	"	"	50
				$455

The only testimony on that subject is that of the defendant himself, who being examined concerning it says: —

"Q. Are the cash items in that third counter-claim correct? A. Yes sir.

"Q. Was that money loaned to plaintiff? A. I don't know, without referring to my books."

Now in pleading this counter-claim, the defendant averred that he had loaned the plaintiff, at his request, and for his use, the sum of four hundred and fifty dollars. And when asked whether he had loaned that money to the plaintiff, which is the very gist of the charge, he says he does not know.

If the defendant made no further proof on this subject, because he was under the impression that the items were conceded by the plaintiff, and if he was taken by surprise by the referee's finding, his proper course was to call the attention of the trial court to the matter by appropriate motion. Instead of doing so he saw fit in that court, as he does here, to charge that the referee's finding upon this counter-claim was legal error. The referee under the testimony found this counter-claim unproved and rejected it. His finding was correct.

Judgment is affirmed with concurrence of all the judges.

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JOHN R. LIONBERGER, ASSIGNEE, Appellant, *v.* W. POHLMAN, Respondent.

January 20, 1885.

1. **PRACTICE — APPELLATE COURTS. — A judgment which has not substantial evidence to support it will be reversed on appeal.**
2. **—— The evidence in support of the plaintiff's petition being sufficient to make out his case, unimpeached, and unattended by any circumstance tending to cast suspicion on it, and there being no substantial countervailing evidence, a verdict for the defendant will be set aside on appeal.**
3. **—— NEW TRIAL. — Under such circumstances, it is the duty of the trial court to sustain a motion for a new trial.**

APPEAL from the St. Louis Circuit Court, LUBKE, J.

Reversed and remanded.

JOHN D. DAVIS, for the appellant.

KLEIN & FISSE, for the respondent.

THOMPSON, J., delivered the opinion of the court.

This is an action to recover the sum of five hundred dollars alleged to be still due upon a promissory note of the defendant which the plaintiff released and delivered to the defendant under a mistake. The petition sets forth that the plaintiff is the assignee of the Broadway Savings Bank, and, as such, was the holder of a promissory note for $5,000 — executed by the defendant, on the first day of September, 1875, which was secured by a deed of trust upon certain property of the defendant; that payments had been made on the same from time to time, so that, on the 30th of December, 1880, there remained a balance due of $2,338.50; that, on that day, the defendant paid to the plaintiff the sum of $1,800, — the plaintiff, at the time, calculating the amount due to be $1,838.50, and agreeing to throw off $38.50, provided the balance was then paid; "that in calculating the interest due, by mistake he failed to count the interest for one year, amounting to the sum of $500, due

upon said note, and that by reason of acting under said mistake, he surrendered said note to defendant, marking the same paid." The petition then avers a subsequent demand by the plaintiff upon the defendant for the payment of the $500, so remitted by mistake, and a refusal to pay the same, and asks for judgment. The answer admits the execution of the note, denies all other allegations of the petition, and then sets up a compromise agreement, by which the plaintiff agreed, in consideration that the defendant himself would sell the property upon which the note was secured by a deed of trust, and with the proceeds of the sale make prompt payment of the note, that he would make a liberal deduction from the note; that, in pursuance of this agreement, the defendant did sell the property for the sum of $4,350 — being $650 less than the amount specified in the note without interest, and that, on the 30th of December, 1880, the defendant agreed, in consideration of what the plaintiff had done, to receive $1,800 in full payment and satisfaction of the note; and alleges that there was no mistake or misunderstanding as to the amount due upon the note, but that the deduction which was made, was made in good faith, to carry out the previous understanding between the parties.

The plaintiff testified to the effect that the amount due on the note at the time of the final settlement was not less than $2,338.50; that it was probably a little more, if compound interest were calculated; that on the 30th of December, 1880, the defendant, with his brother, John H. Pohlman, and a young man whom the defendant had procured to buy the property, came to the plaintiff's office with money to take up the note; that he there calculated the amount due to be the sum of $1,838.50; that this was a miscalculation, and that the mistake occurred by his omitting to calculate the interest for one year, which, at ten per cent per annum, would be $500. He testified most positively and unequivocally, that he had never made any agreement to make a discount on the note, and forego the rate of interest

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which it called for. The note itself was put in evidence with the indorsements thereon. The note and these indorsements show that there was due, on the 30th of December, 1880, approximately, the sum of $2,338.50; it also shows the indorsement made upon the note on that day, at the time when the parties made the final settlement and when it was delivered to the defendant, as follows: "Rec'd Dec. 30, 1880, balance in full on this note, deducting $38.50, in settlement. J. R. Lionberger, assignee." It is plain beyond a doubt, from this statement, that the plaintiff, when he settled with the defendant and surrendered the note, intended to deduct from the amount due on the note the sum of $38.50 only, and that, in point of fact, he did deduct the sum of $538.50.

The defendant endeavored to show, in conformity with what he had alleged in his answer, that the deduction of this large sum had been made in consideration of the defendant procuring a purchaser for the property, and relieving the assignee from the cost and risk to the estate in his hands of endeavoring to make the amount due by a sale of the property under the deed of trust — the defendant having no other property out of which the amount due could be made. The testimony to support this defence was almost entirely that of John H. Pohlman, a brother and partner of the defendant, who attended to the business and conducted the negotiation with the plaintiff for the defendant. This testimony has been examined with care. It not only fails to negative what is palpable from an inspection of the note and the indorsements upon it, that the parties understood at the time of the settlement that the plaintiff was remitting only $38.50, but it fails to show any agreement, whatever, on the part of the plaintiff to remit any definite sum. It is, moreover, inconsistent with itself, in that it states that when John H. Pohlman met the plaintiff on December 30, 1880, for the purpose of making the final payment and taking up the note, he, Pohlman, stated to the plaintiff that

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he found the amount due to be $1,700. He does not state how he found the amount due to be $638.50 less than the amount which was actually due, nor does he state that any promise had been made to him by the defendant from which by a calculation he could arrive at this result.

This testimony as to the agreement of the plaintiff to make an abatement of interest on the note in consideration of the defendant closing out the property, was to the indefinite effect that the plaintiff merely agreed, in consideration of this being done, to "reduce the interest * * * liberally." It does not state that there was any promise to take off any particular amount. Then, when they come to the final settlement, on the 30th of December, 1880, the witness thus describes what took place in the way of carrying out this agreement to reduce the interest liberally: "I came into Lionberger's office with these parties, as they were people that didn't understand much about property, and I told Lionberger, 'I am just in time,' that was the last day; he says, 'yes,' and he sat at his desk. I believe I had been there a day or two before and told him I had made the sale, but I would not be positive about that. He sat down at the table and commenced to figure. 'Have you figured how much you think you owe me?' says he. 'I owe you $1,700,' says I. 'Oh no,' says he, 'you owe me $1,838.50.' I think that was the language he used. I says, 'That is more than I figured it, I think you are a little over.' 'Well,' says he, 'I will knock off the $38.50, and that is all I can do.' I thought that the $500, and the $38.50 was knocked off on the interest. I had paid him the full amount of the note; that is about all that Mr. Lionberger and me spoke; it was all done inside of five minutes. I did not see how he could figure it in that time, for it took me pretty near half a night to figure it; then, says he, 'I will give you this note for $1,800,' and he signed the indorsement and wanted to turn it over to me for me to release it in court. 'No,' says I, 'it won't

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take you a minute to go over to the recorder's office and release it, for these people I have got with me don't understand it;' and Mr. Lionberger and me walked over to the recorder's office and he released it, and I paid for the releasing of it. Q. What was said about the rate of interest you were to pay before the first day of January, 1881? A. He said, if I sold the property before the first day of January, 1881, he would reduce the interest down to such a decent rate that I would be satisfied; of course, I told my brother that language, and that the interest would be about five per cent, and my brother, on that ground, allowed me to sell this property. We figured that we owed him $1,700, the day we sold the last house. If he had asked me two or three thousand, of course, I would have to pay it to give a title, for I could not give a title to the property without it. Q. Was there any mistake in reference to the calculation of the amount of interest that led Mr. Lionberger to take $1,800, or you to pay it? A. I thought I ought not to pay but $1,700, but he was positive I had to pay $1,800, and I paid it, although I paid $100 more than I ought to on the way we sold that ground, because it was a forced sale through him. He asked me to do it, and said he would give me a liberal reduction; and it was a very hard time to sell property in 1880. If I could break the contract of these sales to-day, I would be willing to give him $500 or $1,500 more, but we could not borrow the money; my brother had no property to borrow it on."

On cross-examination, the witness described the interview as follows: "He (Lionberger) sat down and figured; either a day or two before, I am satisfied that I told him that I had sold the property, and he sat down and calculated something. I don't know what. He says to me then, 'How much do you think you owe me?' Says I, 'I owe you $1,700.' Lionberger says, 'No, you owe me $1,838.50.' We spoke a little over it. I thought it was too high, and he says: 'Well, I will reduce it $38.50,

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and that is all I can do,' and he charged me for the note $1,800. The boy had given me the money already, and I had given him the deed, but it was not released, and I turned the money over, $1,800, to Mr. Lionberger, and he signed this on the note. I did not think anything about the balance that was reduced, $38.50, or I would have made him put down $538.50."

This evidence does not, in any substantial degree tend to make out the special defence set up in the answer; but it rather tends to corroborate the testimony of the plaintiff, and to show that the plaintiff accepted $1,800, under a mistake. It shows that the plaintiff agreed to knock off $38.50, and no more. Knocking off this sum and receiving $1,800 would leave $500 still due, and that is what the plaintiff sues for. The witness entirely fails to show that there was any agreement on the part of the plaintiff that this additional sum should be knocked off; but he shows that there was no such agreement, and all the other testimony shows this. The mere fact that the witness thought "that the $500 and the $38.50 were knocked off on the interest" merely goes to show that he was not guilty of any bad faith in the matter. It does not show that the plaintiff understood that he was knocking off $538.50 of the interest. The witness entirely fails to show any agreement on the part of the plaintiff to abate this sum of $500, and the conclusion is inevitable that the accepting of no more than $1,800 was the result of a mistake on his part. If the testimony is examined and sifted through and through, it will appear: 1. That there is no evidence in the record that the plaintiff ever agreed to remit any particular sum from the amount due on the note until the day of final settlement. 2. That he never agreed to remit any greater sum than $38.50, which he agreed to remit on the day of settlement. This leaves the special defence set up in the answer wholly unsupported by substantial testimony. The rule settled by recent decisions in the supreme court and this court is, that

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where there is no substantial testimony to support the verdict of a jury upon a given issue the appellate court will reverse a judgment on the verdict. On the other hand, there is frequent difficulty in saying what the rule should be where the jury have found their verdict against affirmative testimony, against which no substantial testimony has been offered by the other side. But, after mature deliberation, we are of opinion that the correct rule is, that, where the testimony offered in support of the allegations of the party who sustains the burden of proof is, if believed, sufficient to make out his case, and is clear, consistent with itself, delivered by an unimpeached witness, and no circumstance is developed tending to cast suspicion upon it, and no substantial countervailing evidence is offered by the other party, if the jury, nevertheless, disregard it, and return a verdict against it, it will be the duty of the trial court on a motion for new trial, and of an appellate court on appeal or error, to set it aside as being the result of a manifest mistake.

Such it seems to us was this case. The verdict is plainly and palpably the result of a mistake on the part of the jury, and the judgment which has been entered thereon involves an obvious miscarriage of justice. It is our duty to prevent such a result, where we can do so consistently with settled principles of law. We accordingly reverse the judgment and remand the cause. It so ordered. All the judges concur.

M. D. Lewis, Administrator, Respondent, *v.* F. X. McCabe, Administrator et al., Appellants.

January 20, 1885.

1. Administration — Costs. — An estate can not be charged with the costs of a proceeding begun by one whose administration of the estate was wholly without authority and void.

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2. —— One who, without legal authority, sues as administrator and fails to recover, is liable for the costs *de bonis propriis*.

3. —— COMPENSATION. — An administrator's compensation is not necessarily confined to the statutory commissions.

4. —— JUDGMENTS — RECEIVER. — An order appointing a receiver to take charge of property until the further order of the court, is not a final judgment.

APPEAL from the St. Louis Circuit Court, HORNER, J.

Reversed and remanded, with directions.

E. T. FARISH, for the appellants.

W. L. SCOTT and E. M. MCGINNIS, for the respondent.

LEWIS, P. J., delivered the opinion of the court.

The plaintiff as public administrator of the city of St. Louis, undertook to act as administrator of the estate of W. J. Maynard, who died in New Orleans in the year 1867. In that capacity the plaintiff prosecuted a suit which had been commenced by his predecessor in office, against the legal representatives of Catherine O. Long, deceased, for an alleged waste and conversion by her in her lifetime of valuable property of Maynard's, in the city of New Orleans after his death. He obtained a judgment in the circuit court, which was affirmed by the court of appeals, and was thereupon taken by appeal to the supreme court. Pending this appeal, the plaintiff, assuming that his judgment would be again affirmed, instituted the present proceeding in the nature of a bill in equity against Catherine Long's representatives, for the appointment of a receiver to take charge of and preserve certain real estate in their possession, so that it might be available for the ultimate satisfaction of his claim. This application was granted in May, 1879, and the defendant McCabe, who had become administrator of Catherine Long's estate, was appointed receiver, giving an approved bond in the sum of $5,000. He took the property into possession, collected rents and made settlements, etc., until some time in the year 1883, when the property was surrendered to the parties from whom it had been taken.

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The supreme court, however, reversed the plaintiff's judgment on the ground that his administration of Maynard's estate was wholly without authority and void from the beginning, that the claim sued upon was not an asset of that estate, but was, if available at all, a right vested in its distributees, who alone were competent to sue for its enforcement. There were, outside of this claim, no assets, real or supposed, of the estate of Maynard.

After the determination of the cause in the supreme court the defendants moved in the circuit court for a dismissal of the present proceeding and a taxing of the costs against the plaintiff *de bonis propriis*. The court sustained the motion as to dismissal and, overruling it in the matter of costs, directed that the costs be taxed against the plaintiff *de bonis testatoris*. From this order the defendants appealed.

An insuperable difficulty in the way of sustaining this judgment appears in the fact that it directs the plaintiff to make disbursements from a fund which is not his and which was never under his lawful control. It is like commanding A to make a transfer of the property to B without B's concurrence. It is fundamental that no valid judgment can be rendered against any person or thing, when such person or thing is not properly before the court. The estate of Maynard was never in court for any purpose. According to the decision of the supreme court it was not represented by the plaintiff, who could no more bring it into litigation than he could the property of any stranger, without a shadow of authority from its owner. It makes the case neither better nor worse that the estate was valueless. If it had been worth thousands it could never have been made the object of a judgment wherein it was not represented by any person authorized to appear for it. This is conclusive against the propriety of the action of the circuit court, but some other considerations are not less so.

It is settled law in the case of a rightful administrator,

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that upon his failure to sustain upon the merits a suit brought by him on a cause of action which arose after the death of his intestate, he must be taxed with the costs *de bonis propriis*. *Woolridge* v. *Draper*, 15 Mo. 470; *Ross* v. *Alleman*, 60 Mo. 269. With how much greater emphasis should the rule be enforced when the party begins a litigation not only without justification in the merits of the cause, but also without personal authority to sue upon a just demand.

This record shows that, after the judgment in the supreme court, the defendants moved there for a taxation of the costs against the plaintiff, *de bonis propriis*, upon the specific grounds that the plaintiff was not legally in charge of the estate of Maynard, and that the cause of action, if any, arose after Maynard's death. The motion was sustained, manifestly on those grounds. They are the same grounds upon which the present proceeding was dismissed by the circuit court, in proper deference to the views of the higher tribunal. The ruling of the supreme court as to the necessary effect of those grounds upon the taxation of costs is a controlling precedent, brought to our attention on the face of the record, and we are bound to follow it to the same conclusion. When this cause was dismissed the plaintiff became the losing party, and there is therefore not the slightest difference in controlling principles between the two cases. The authorities cited, touching a discretion in allowing costs on motions, have exclusive application to discriminations between the adverse parties. They have nothing to do with the question arising when an administrator, as the losing party, becomes liable for costs, whether he shall pay them out of the estate or out of his own pocket. On that question the law is settled, and there is no such discretion.

We can not occupy space in discussing all the points raised for the plaintiff. As to many of them it is difficult to believe that learned counsel really expect us to find in them any

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persuasive force. For instance, quite a number of arguments are based on the preliminary assumption that the case before us was a proceeding instituted to aid the probate court in an enforcement of its order which commanded the devisees of Catherine Long to surrender the lands in their possession to McCabe as administrator of her estate, and thus to place in his hands assets which he was otherwise unable to control. And yet there is not a line in the record intimating that any such application was offered, or that any order of the court was directed to such an end. The petition asks for the appointment of *a receiver*, who will, of course, when appointed, be under the exclusive control of the circuit, and not of the probate court. It is a mere coincidence that the man who held the position of administrator was also invested with the office of receiver. The court might have appointed any other person to be receiver, in perfect accord with the prayer of the petitioner and with the purposes of the suit. McCabe as receiver and McCabe as administrator were as distinct in rights, duties, responsibilities, and titles to compensation for services rendered as if the two characters had been borne by different individuals. The plaintiff strangely insists that the compensation allowed by the circuit court to the receiver should be diminished by the amount awarded to the administrator by the probate court. If it were true that the administrator's commissions of five per cent covered his entire right of compensation for the management of real estate and the performance of all other duties, this would not curtail the circuit court of its exclusive jurisdiction to compensate the receiver, however it might take into equitable consideration, in fixing the amount, any other emoluments enjoyed by the same party from correlative sources. But it is not true. The statute allows extra compensation to administrators for services similar to those here performed by the receiver. *In re Handfield's Estate, ante*, p. 332. Nothing in this record furnishes a proper basis for any revision of the circuit

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court's discretion in fixing the amount of the receiver's compensation.

Counsel for the plaintiff erroneously assume that an entry of record in the circuit court on February 25, 1880, was a final judgment, and argue hence that all the subsequent proceedings in this cause, including the allowance to the receiver, were *coram non judice*, and void. The order there made appointed the receiver, and directed him to take charge of the property described, and to "collect the rents and pay the taxes and preserve said real estate, until the further order of this court." As in all cases of receiverships, the cause continued to be pending for appropriate supplementary orders until the discharge of the receiver. The final judgment was rendered in the dismissal of the cause, on May 19, 1884.

The necessary conclusion may appear to be a harsh one for the plaintiff, who is well known to be a most faithful and efficient public officer. But it is only one of the numerous cases wherein a slight error of judgment may entail graver consequences than the mere ethics of rewards and penalties could ever invoke. There is no need for any doubt that the plaintiff acted throughout with a conscientious zeal in the performance of what he believed to be his duty. But he took upon himself all the risks of the judicial outcome. He set in motion the legal machinery which compelled the receiver and other officers of the courts to perform services for which the law declares they must be paid. The supreme court has said that he did this without any legal justification or authority, and it follows, by all controlling precedents, that he only must bear the loss. The judgment will be reversed and the cause remanded, with directions to the circuit court to tax the costs in conformity with this opinion. All the judges concur.

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G. G. Gibson, Respondent, *v*. Henry Kayser's Executor et al., Appellants.

January 20, 1885.

1. Special Tax Bills — Street Reconstruction — Cross-walks. — A special tax bill for reconstructing a street may include charges for the spaces usually occupied by cross-walks, where the ordinance under which the work is done does not require that cross-walks shall be made.
2. —— Street Intersections. — Such a special tax bill may include charges for work extending to the middle line of the cross streets at each end of a block.
3. —— Curbing. — Such a special tax bill may include charges for curbing, not done in front of the particular lot against which the bill is made out, but done on other lots abutting on the improved street, the assessment being made *pro rata* against all the lots abutting on the street.
4. —— Grading. — In reconstructing a graded street, excavations which are necessary to prepare the street for laying the new paving material do not constitute "grading" within the meaning of the charter provision which makes the cost of grading a charge against the city.

Appeal from the St. Louis Circuit Court, Thayer, J. *Affirmed.*

John Wickham and J. L. & F. P. Blair, for the appellants: Cross-walks are not the raised portions of the road way in a city, extending from corner to opposite corner, but are the areas of the roadway traversed by pedestrians when they cross a street in the prolongation of the sidewalk. — *Blunt* v. *City of Janesville*, 31 Wis. 648, 656, 662. A lot is not chargeable with the cost of curbing not done in front thereof. — *Schenly* v. *The Commonwealth*, 36 Pa. St. 29, 60. Nor with the work done at the intersection of streets.

Leonard Wilcox, for the respondent: The ordinance did not direct cross-walks to be constructed, and none were constructed. — *Farrar* v. *St. Louis*, 80 Mo. 379. The lots mentioned in the petition were properly assessed with their proportion of the cost of the curbing actually done. No

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other mode of assessment would have been legal.—*Eyerman* v. *Hardy*, 8 Mo. App. 311; *Neenan* v. *Smith*, 50 Mo. 526, 531; *Weber* v. *Schergens*, 59 Mo. 389, 393. That no curbing was done in front of said lots might have been a defence *pro tanto*, on the ground that the work was not properly done, if such a defence had been pleaded and it appeared that injury had resulted to the property (Charter, 2 Rev. Stats., p. 1610, sect. 25), but it certainly did not make the ordinance void.—*Farrar* v. *St. Louis*, *supra*; *Creamer* v. *McCune*, 7 Mo. App. 96; *Neenan* v. *Smith*, 60 Mo. 292; *Bank* v. *Arnoldia*, 63 Mo. 229; Charter 1876, art. VI., sect. 18.

LEWIS, P. J., delivered the opinion of the court.

This is an action on four special tax bills for work and materials furnished in reconstructing and repairing First Street, from Almond to Spruce Street, in the city of St. Louis.

The defendants complain that they are charged with the cost of paving areas which should have been occupied by cross-walks, but were not, although it was the duty of the city to make them. A similar objection was raised in a somewhat different form, in *Farrar* v. *City of St. Louis*, (80 Mo. 379). As would appear from Judge Norton's opinion, the property owner claimed that the special tax bill for an improvement extended over the length of seven squares, necessarily included the cost of cross-walks which the city was bound to construct at its own expense. It was held that the objection was not well taken, because the special ordinance for the work did not require any cross-walks to be made. The same omission from the ordinance exists in the present case, and the same result must follow in our disposition of the present objection. It is purely within the option of the city authorities to establish cross-walks, or not, according to their understanding of the public needs. Whenever they are established, the city must pay

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for their construction. Where they are not established, the area of road construction which they might occupy, but do not, is as legitimate a subject of charge against the lot owners, as any other in the road-bed. No law makes it the duty of the city to construct cross-walks at all street intersections. Our attention is called to *Blount* v. *City*, 31 Wis. 648. In that case, the crossings at the street intersections were of the same material as the roadway, and were slightly elevated for the accommodation of pedestrians. The court held that they should be paid for from the fund appropriated to cross-walks. Says the opinion: "The charter recognizes the designated spaces at the street crossings as cross-walks, and so must we." The St. Louis charter, so far as we can perceive, contains nothing of like effect. We understand a cross-walk to be a structure specifically adapted to the use of pedestrians, whether placed at the street intersections, or any where between them.

The street improvement in this case extended to the middle line of the cross street at either end of the block. This extension, it is objected, created no proper charge against an owner of property between the proximate lines of the cross streets. If the objection be well founded, there is at every street intersection a square of ground, defined by the exterior lines of the two streets, the cost of whose improvement can not be assessed against any property owner. Such is not the law. The special ordinance in this case expressly provided for "making all proper connections and intersections with other streets and alleys," and that, "the entire cost of the foregoing work, and all proper connections and intersections required, shall be charged as a lien upon the adjoining property fronting or bordering on the improvement herein provided for, and shall be paid by the owners thereof." If these provisions are valid and enforcible, the objection must fail. The ordinance in the *Farrar Case* above mentioned contained the same provisions, word for word, and the supreme court sustained their ap-

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plication with full effect to all the streets intersecting Washington Avenue, from Fifth Street to Twelfth. The argument that inequalities appear in the fact that owners of property fronting on the cross streets are not assessed, is of no force. Practical inequalities are unavoidable in all assessments for public improvements, but they are never held to vitiate an exercise of the municipal authority involved, where it is not shown that they violate some right distinctly guaranteed by law. In the *Farrar Case*, our supreme court adopts the language of Dillon on Corporations (sect. 752), which seems to dispose of all the objections here raised in this connection: "The courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the taxing power or included within it, and the many cases which have been decided fully establish the general proposition that a charter or statute authorizing the municipal authorities to open or establish streets, or to make local improvements of the character above mentioned, and to assess the expense upon the property which in the opinion of the designated tribunal of officers shall be specially benefited by the improvement in proportion to the amount of such benefit, or upon the abutters in proportion to benefits or frontage or superficial contents, is, in the absence of some constitutional restriction, a valid exercise of the taxing power."

It is further objected that it was unlawful to assess the cost of curbing against defendant's lot, because no curbing was done on that lot, and all that was done was upon the lots of other owners, fronting on the improvement. The city charter directs: "The paving, *curbing*, guttering, sidewalks, and the materials for the roadways, the repairs of all alleys, and sidewalks, shall be charged upon the adjoining property as a special tax, and collected and paid as hereinafter provided." Rev. Stats., p. 1608, sect. 18.

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The subsequent provisions, and the ordinances passed in pursuance of them, are those under which the present assessment was made, and which have been uniformly sustained by judicial authority. It is perceived that curbing is placed upon the same footing as materials for roadways, and this sufficiently brings it within the "linear front foot rule." The city ordinance (Rev. Ord., p. 529, sect. 3), applies to cases where the lot owner neglects to keep his sidewalk in repair. It is not adapted to a general reconstruction or improvement of the street. Such an application of the ordinance would be unauthorized, as in derogation of the charter.

In preparing the road-bed the ground was excavated to a depth of eighteen inches below the intended surface line of the street. The defendants complain that they were unlawfully charged for this work, because the city is bound to do all the grading. But the work referred to was not grading. It was a mere preparation of the ground for the superstructure. "Grading" is the establishing of the level, or inclination, as the case may be, as determined upon for the surface way of the street. It may be accomplished, according to circumstances, as well by filling above the natural surface, as by digging below it.

The exhaustive opinion of Judge Norton, in *Farrar* v. *City* (80 Mo. 379), completely answers, in our view, every objection raised against the special tax bills in the present case. So far as there is novelty in the present defence, it appears rather in the skillful methods of the argument, than in the substance of the points urged upon our attention.

With the concurrence of Judge THOMPSON (Judge ROMBAUER not sitting) the judgment is affirmed.

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JOHN G. PRIEST, Appellant v. JOHN LAWRENCE, Respondent.

February 10, 1885.

1. **DE FACTO OFFICERS — SCHEME AND CHARTER — RECORDER OF DEEDS. — During the interval between the election which resulted in the separation of the county from the city of St. Louis and the judicial ascertainment and official promulgation of that result, the recorder of deeds for St. Louis County remained the *de jure* recorder for both the city and the county.**
2. **JUDICIAL NOTICE. — Appellate courts will take judicial notice of the historical facts as to the dates when and the circumstances under which a constitutional change in a county government occurs.**

APPEAL from the St. Louis County Court, EDWARDS, J.

Reversed and remanded with directions.

W. F. BROADHEAD & W. H. CLOPTON, for the appellant: Recording being the act of an officer of the law — not of the person presenting the instrument for record — and the recorder for St. Louis city and county being the *de facto* recorder for all the county until the official promulgation of the result of the election, his recording the deed in the city was the act of a *de facto* officer, of which the world must take notice and by which all persons are bound. — *The State* v. *Douglass*, 50 Mo. 593; *Ex parte Snyder*, 64 Mo. 58; *The State* v. *Seay*, 64 Mo. 89; *Wickersham* v. *Woodbeck*, 57 Mo. 59; *The City* v. *Stoddard*, 15 Mo. App. 473.

JOHN JOHNSON, for the respondent: The deed not having been recorded in the territorial subdivision of the state in which the land lay, did not impart constructive notice. — *Muldrow* v. *Robison*, 58 Mo. 331; *Davis* v. *Ownby*, 14 Mo. 170; *Terrell et al.* v. *Andrew County*, 44 Mo. 309; Rev. Stats., sects. 691, 692, 693.

LEWIS, P. J., delivered the opinion of the court.

This is an action of ejectment for a parcel of land situated in the county of St. Louis. Both parties claim under a common source of title from Ringrose J. Watson.

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Plaintiff exhibits in evidence a deed to himself from Ringrose J. Watson, dated November 20, 1875, and recorded in the recorder's office in the city of St. Louis on December 18, 1876. Defendant relies upon a deed from the coroner of St. Louis county, dated August 30, 1880, conveying the land to Henry R. Watson under an execution sale upon a judgment against Ringrose J. Watson, rendered by a justice of the peace, on October 9, 1876, of which a transcript was filed in the clerk's office of the circuit court, city of St. Louis, on October 25, 1876. This judgment was revived in the same circuit court on December 13, 1880. The court below held in this case that the recording of the plaintiff's deed imparted no notice as against the defendant's claim of title, because the scheme of separation had then gone into effect, and the land lay without the boundaries of the city in which the recording was done. The judgment was for the defendant.

In pursuance of constitutional provisions, the scheme and charter were submitted to the popular vote on August 22, 1876. It was officially announced by the clerk of the county court that the election had resulted in a defeat of those measures. This result was generally acquiesced in, and the old order of things continued without interruption until the month of December next following. By the terms of the constitution, the scheme and charter, if adopted, were to go into effect at the expiration of sixty days after the election, and there was to be an official promulgation of the fact, signed by the mayor of the city and the presiding justice of the county court. A new presiding justice, Charles Speck, was elected in November, under the old law, and qualified in due form. About this time sundry judicial proceedings were instituted with a view to testing the true results of the election held in August, and these inquiries terminated in a reversal of the clerk's announcement, so that, on December 29, 1876, the mayor of the city and the then acting presiding justice of the county

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court, Charles Speck, issued their official promulgation, in due form, declaring that the scheme and charter had been fully ratified by the popular vote. These are matters of public history whereof we must take judicial notice. It should be added that no county officers for the separated county were elected or appointed until after the 29th of December, 1876.

According to the theory of the circuit court, the territory which, until sixty days after the election held in August, 1876, had constituted the county of St. Louis, became at the expiration of that period, both in fact and in law, two distinct and several municipal subdivisions of the state; so that the recording of a deed in one of them for land wholly situate within the other, imparted no notice of the contents, and was equivalent to no recording at all. If this proposition is correct, a like ruling must be applied to all acts which the law required to be done by a county officer within the county. During the interval between the legal separation and the appointment of officers for the separated county, no citizen could sue or be sued before a court of record within that subdivision, because there was neither court nor sheriff empowered to act therein. There could be no indictment found anywhere for crime committed within the same boundaries. No taxes could be paid; and if the tax-payer voluntarily paid them to the collector for the old county, his obligation would not be discharged. And an important functionary, whose seat of power was founded within the city, could not have listened to the prayer of such worthy citizens of the county as might have desired the licensing of a convenient dram-shop. Happily, our existing law did not admit of such an appalling *interregnum*.

Counsel for the plaintiff invokes, as applicable to his client's case, the *de facto* rule, one of the oldest and most firmly established in our jurisprudence. This is always enforced in favor of the citizen, who, in order to the enjoyment of

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a legal right, is compelled, without any fault of his, to depend upon one whose assumed tenure as an officer, though not legal, is yet such as to bring him within the description of a *de facto* officer. The plaintiff had, in his option, an unquestionable right to the cumulative assurance of his title provided for in the registration laws. He could not avail himself of this right in the separated county, because neither a recorder, nor a recorder's office was yet to be found there.

But we do not think that, in the facts of this case, there was any need for the plaintiff to find in the officer with whom he filed his deed for record, a *de facto* recorder. The constitutional provisions which prepared the way for the introduction of the scheme and charter contain nothing which, by any sort of implication, can be supposed to have intended that the old local governmental machinery should cease to operate before an actual erection and organization of the new. Such a supposition would be in antagonism with the whole spirit of our institutions, which recognize the paramount necessity of an unintermittent government by law. The scheme itself was a law defining boundaries; but not establishing *ipso facto*, when it became a law, the several agencies of the state's sovereignty, by which this was to be represented on either side of the dividing line. That was to be accomplished later by means which the same law pointed out. The principle is illustrated in *The People* v. *Maguire* (32 Cal. 143), where the court said: "So far as defining its boundaries is concerned, the act itself forms the county; but so far as its organization is concerned, it merely directs how it shall be accomplished. To constitute a county, something more is required than to define its boundaries. A local government must be provided, and the creation of the county is not accomplished until both these things have been done in the appointed mode." See also, *Mason* v. *Woerner* 18 Mo. 566. From these principles it results that, although at the time referred to the

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scheme had become a law, yet the separated county had not then acquired a legal existence.

Article XIV., section 5, of our state constitution, declares: "In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified." It can hardly be an overstrained construction, to say that when, through changes effected by operation of law, the old recorder for the city and county became superseded, as to the county territory, by the new recorder for that territory; the last recorder was, as to the same territory, the lawful successor of the first within the constitutional meaning. If a doubt shall linger over this view of the situation, it should be easily resolved by the constitutional solicitude manifest in that section, for a constant retention of existing governmental personal agencies, until their legal substitutes shall be quite ready for the official services due to the public. Every exaction to be found in the spirit, as well as the letter of the constitution, in this connection, requires us to hold that the recorder acting for city and county when the plaintiff's deed was filed for record was *de jure*, the proper officer for that purpose, as to lands lying within the territory which was afterwards organized as the separate county of St. Louis.

Some questions are here discussed, arising out of the bankruptcy of Ringrose J. Watson in 1877. The conclusion herein reached, as to the effect which ought to be given to the recording of the plaintiff's deed from Watson, eliminate them from the controversy, and there is no need for us to consider them. The same is true of the questions concerning the sufficiency of the judgment and transcript proceedings under which the defendant claims. The defendant's admission of the common source of title, and of his possession of the premises at the time laid in the petition, preclude all further controversy about the plain-

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tiff's right of recovery. The value of the rents and profits is admitted, at $6 per annum. The judgment is reversed and the cause remanded, with directions to the circuit court to enter a judgment for possession in favor of the plaintiff, with an assessment of his damages computed at $6 per annum from the first day of February, 1883, to the date of the judgment, and for prospective value of monthly rents at the same rate. All the judges concur.

STATE OF MISSOURI TO USE OF J. H. MCCORMICK, Respondent, *v.* J. H. MCDOUGAL ET AL., Appellants.

February 10, 1885.

PRACTICE — ACTIONS — WHERE BROUGHT — STATUTE CONSTRUED. — The plaintiff being a resident of one county and one of the defendants a resident of another county while the other defendant is a non-resident of the state, the action is properly brought in the county where the plaintiff resides and the defendants are found.

APPEAL from the St. Louis Circuit Court, ADAMS, J.

Affirmed.

JAMES P. DAWSON, for the appellants: An appearance which is not general waives no right of the party thus appearing.—*Smith* v. *Rollins*, 25 Mo. 408; *Pomeroy* v. *Betts*, 31 Mo. 419; *Lincoln* v. *Hilbus*, 36 Mo. 149.

KEHR & TITTMANN, for the respondent: The court acquired jurisdiction of the person.—*Atkins* v. *Borstler*, 46 Mich. 552; *Murphy* v. *Winter*, 18 Ga. 690; *Wynn* v. *Kiser*, 7 Blackf. 299; *Vinal* v. *Core*, 18 W. Va. 20; *Covill* v. *Moffett*, 7 Jones L. 381.

LEWIS, P. J., delivered the opinion of the court.

The plaintiff resides in the city of St. Louis. The defendant McDougal is a resident of the state of Illinois, and

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defendant Million, of Clark County, Missouri. The defendants were both served with process in the city of St. Louis. The only question presented in this appeal is, whether the St. Louis circuit court acquired jurisdiction of the persons of the defendants?

Revised Statutes, section 3481, provides: "Suits instituted by summons shall, except as otherwise provided by law, be brought:—

"*First*. When the defendant is a resident of the state, either in the county within which the defendant resides, or in the county within which the plaintiff resides, and the defendant may be found.

"*Second*. When there are several defendants, and they reside in different counties, the suit may be brought in any such county.

"*Third*. When there are several defendants, some residents and some non-residents of the state, suit may be brought in any county in which any defendant resides.

"*Fourth*. When all the defendants are non-residents of the state, suit may be brought in any county."

The defendants maintain that by the terms of the third clause, this suit could properly be brought no where but in Clark County, Missouri, where one of the defendants resides. Such a construction, ignoring all the other parts of the law, would set aside the plainest rules of statutory interpretation. If the clause stood entirely alone, there might be some plausibility in the claim.

The idea involved in the defendants' point is that, inasmuch as "there are several defendants, some residents and others non-residents of the state," the third clause is the only provision applicable; and that, as to each defendant, although "found" in the city of the plaintiff's residence, the second alternative of the first clause can not be applied, because it is superseded by the special provision made in the third clause for this particular class of cases. This would amount to a repeal by implication.

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Let us apply the same test to the operation of the second clause. By that interpretation, if there are several defendants residing in different counties in this state, a suit against them can be brought no where but in one of those counties.

To illustrate: A, residing in the city of St. Louis, holds a promissory note signed by B and C, who reside in different counties in this state, outside of St. Louis. If B be found in St. Louis A may sue him there, by virtue of the second alternative in the first clause. If C be afterwards found in the same place A may sue him also in the same court. But if unfortunately he should happen to sue them both in one proceeding, the jurisdiction must fail, because of the special provision made for all such cases in the second clause. Could any conclusion be more absurd? The illustration would equally fit an application of the third clause to the situation of the parties in the present case. The plaintiff might sue defendant Million under the first clause, because he was found in the city of St. Louis, where the plaintiff resides. He might sue defendant McDougal in the same jurisdiction, because, under the fourth clause, a non-resident defendant may be sued in any county. Yet, though a complete jurisdiction was thus acquired over each defendant, by virtue of the provisions applicable, respectively, to their several conditions, there could be no jurisdiction over both, because there happens to be still another provision by which, cumulatively, they might also be sued in the county of Million's residence. In other words the first and fourth clauses, as to either defendant, are repealed by implication in the third. The law intends no such incongruities. They all vanish before a very familiar rule of statutory interpretation. In construing any part of a law, the whole must be considered; and, if possible, such a construction is to be made as will avoid any contradiction or inconsistency. Sedgw. on Stat., 200. Thus the several clauses in the section under consideration are to be regarded as cumu-

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lative provisions for securing the jurisdiction over parties defendant, and not as repealing or superseding each other. If, by virtue of one provision, jurisdiction may be acquired over any defendant the practical effect of such provision is not to be annulled by the fact that another provision might subject him to jurisdiction in a different place, by reason of his association with other defendants. Effect must be given to all the provisions in a law, whenever possible; and there is no difficulty about so doing in the present instance. Defendant Million can not complain of a jurisdiction asserted over him in exact conformity with the law whose terms are directly applicable to him as an individual. Defendant McDougal is in a like position. Why then should either be heard to complain for the other, or for a supposed joint wrong when neither is wronged in fact? The circuit court properly held that the defendants were duly brought within its jurisdiction, and its judgment is affirmed with the concurrence of all the judges.

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THE STATE OF MISSOURI, Respondent, v. WILLIAM WACKER, Appellant.

February 10, 1885.

1. **CRIMINAL LAW — INDICTMENT — ARSON. — An indictment which charges that the defendant "did, unlawfully, etc., set fire to and burn a certain dwelling house situated in the city of St. Louis aforesaid," is too indefinite in its description of the house to support a conviction.**
2. **—— PRACTICE. — A judgment in a criminal case having been reversed because of the insufficiency of the indictment, the defendant will not be discharged, but the cause will be remanded, where "there is reasonable ground to believe that the defendant can be convicted of an offense if properly charged."**

APPEAL from the St. Louis Criminal Court, VAN WAGONER, J.

Reversed and remanded.

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Martin & Fauntleroy, for the appellant: The indictment is insufficient. — *Wheat* v. *The State*, 6 Mo. 455; *The State* v. *Hogan*, 31 Mo. 340; *The State* v. *Jones*, 68 Mo. 197; *McGary* v. *The People*, 46 N. Y. 153.

Ashley C. Clover, for the respondent: The indictment is sufficient. — Rev. Stats., sect. 1283; *The State* v. *Hayes*, 78 Mo. 307; *Regina* v. *Newboult*, 12 Cox C. C. 148.

Lewis, P. J., delivered the opinion of the court.

The indictment charges that the defendant did, on, etc., "unlawfully, feloniously, wilfully, and maliciously set fire to and burn a certain dwelling house situated in the city of St. Louis aforesaid, in which dwelling house there were then and there human beings, contrary to the form of the statute," etc. The defendant was found guilty of an attempt to commit arson in the first degree and sentenced to a five years' term in the penitentiary. A motion in arrest of judgment for insufficiency of the indictment was overruled.

At common law, the crime of arson was considered chiefly as an offence against the security of personal inhabitation, so that it was no crime for a man to set fire to his own house. Hence, while it was always held necessary to specify by name the person whose house was burned, the reason usually given was, that it should thus be shown that it was not the house of the person accused. Such a reason can have no application in this state, since our statute is directed against "every person who shall wilfully set fire to or burn *any* dwelling house," etc. But it remains to be considered whether other reasons may not be equally effective to the same end, in requiring that the house set fire to, or burned, shall be specifically identified by the name of the owner or occupant, or by some other matter of description which will clearly inform the defendant of the particular act charged against him, and which will protect him against another prosecution for the same offence. We

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have no decision in Missouri upon the precise question thus presented. Of other states whose statutes are in effect the same with ours, a like remark may be made. An examination of a large number of adjudicated cases leads us to the conclusion that no court of last resort in this country has ever held that an indictment which mentions the object of an arson by so indefinite a description, only, as "a certain dwelling house situated in the county (city, or town, as the case may be) of ———," is sufficient. Controversies have been numerous over such questions as: Whether the name of the owner, or only that of the occupant, will suffice; whether that of the tenant, or that of the holder of the fee; whether, the name having been inserted, proof may be made of a different owership or occupancy, etc. It seems to be generally agreed that it must be the name of the occupant or tenant which appears; and this follows the common-law idea of protection to inhabitancy. Also, that the name of the occupant having been given in an indictment, the proofs must exactly correspond. 16 Pick. 120; 45 N. Y. 153; 61 Mo. 276; 19 N. Y. 537; 28 Ala. 71; 26 Ala. 72; 20 Cal. 76; 20 Wis. 647; 46 Ala. 204; 40 Ala. 659; 62 N. Y. 126. It is further settled that, where the object of the arson is a public building, described by its name in the indictment, nothing need be said about its ownership or occupancy. 29 Ark. 147; 12 Vt. 93; 4 Leigh, 683. This conclusion fully harmonizes with every reasonable exaction touching the clear identification of the building.

Passing over the cases in which it is insisted that it should appear whose house was burned, for the reason that the indictment must show that it was not the house of the person indicted, we find it generally taken for granted that a description of the building by the name of the owner or occupant properly fulfils a requirement which applies to all indictments for crime, to wit: that the accused shall be

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informed of the particular act concerning which he must prepare his proofs in defence.

It would seem to follow, on general principles, that if neither this, nor any other description particularly specifying the building is given, the requirement will be disobeyed. "A certain dwelling house situated in the city of St. Louis," fitly describes any one of several thousand dwellings. The accused may know himself to be charged or suspected with reference to two, or a dozen, or more of them. He can not, in such a case, have any assurance of the protection intended by the rule. All analogies traceable through the rulings, in this state and elsewhere, upon indictments for other crimes, point directly to the conclusion that the indictment in the present case is bad.

In *Woodford* v. *The People* (62 N. Y. 126), the question was, whether the expression "property of," or "belonging to," would satisfy a statute which referred to the burning of the dwelling house "of" A B. The court said: "It is necessary to specify the owner of the dwelling house, but whether this is done by stating it as the house of, or as the property of, or as owned by or belonging to A B, it is sufficient for the purposes of alleging ownership of dwelling house in an indictment for arson." In *Shepherd* v. *The People* (19 N. Y. 537), upon a question whether the name of an owner or of a lodger should have been inserted, the court said: "Either method would have sufficiently *identified the building*, which is all that the ends of justice require." A similar remark is made by our supreme court in *The State* v. *Moore*, upon a question of variance between the allegation and proofs: "All that the ends of justice required was the building should be sufficiently identified by the allegations of the indictment, and that those allegations should find support in the testimony adduced, and this was done." The supreme court of California said, in *The People* v. *Myers* (20 Cal. 76): "The allegation of the ownership of the

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building burned is a part of the description of the offence. It is a general rule of criminal pleading, as well as a provision of our statute, that the indictment must be direct and certain as it regards the offence charged. * * * The defendant must be distinctly informed whose dwelling house he is accused of burning. It is urged in reply that surplusage may be rejected. But no allegation which is descriptive of the identity of what is legally essential to the charge in the indictment can be rejected as surplusage."

As to the analogies above referred to, they may be found in a number of decisions by our supreme court. An indictment for keeping a ferry without license was held bad, because it did not specify on what stream or river the ferry was kept. Said Napton, J.: "As there may be several water-courses in Livingston County, a conviction on this indictment would constitute no bar to another prosecution for the same offense." *Wheat* v. *The State*, 6 Mo. 455.

An indictment for delivering a false and fraudulent return to the assessor held insufficient, because it did not describe the taxable property omitted. *The State* v. *Welch* 28 Mo. 600. *The State* v. *Hogan* was on an indictment for shooting at a mark along and across a public highway. Judge Ewing said: "Where generic terms are included in the definition of an offence, as they necessarily must be, it is not sufficient that the offence should be charged in the indictment in the same generic terms, as in the definition particulars should be stated, and the indictment in omitting to designate the highway across which the shooting occurred, is defective." See also *The State* v. *Kroeger*, 47 Mo. 530; *The State* v. *Rochforde*, 52 Mo. 199; *The State* v. *Maupin*, 57 Mo. 205.

We are of opinion that the criminal court erred in overruling the motion in arrest of judgment. It is clear, as we think, from the testimony preserved in the record, that "there is reasonable ground to believe that the de-

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fendant can be convicted of an offence, if properly charged." The judgment is reversed, and the cause is remanded to the criminal court, with directions to proceed under the provisions of Revised Statutes, section 1972. All the judges concur.

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WILLIAM DWYER, Respondent, *v.* MARY E. DWYER, Appellant.

February 10, 1885.

1. DIVORCE — DESERTION — PRESUMPTIONS. — A separation caused by indignities of the husband to the wife, and which he does not seek to terminate by making reparation or otherwise, is presumed to have been, and to continue, with his consent.
2. —— A husband who is guilty of ill-treatment of his wife which causes her to leave him, but which is not such as renders her condition "intolerable," and who, though living at the same town, makes no reparation, is not an "injured party" within the meaning of the divorce statute.
3. —— CROSS-BILL. — The wife in such a case can not maintain a cross-bill against her husband for refusing to provide for her.
4. —— PER ROMBAUER, J.: — A husband or wife does not cease to be the "injured party" by conduct which is not such as to entitle the other party to a divorce.

APPEAL from the St. Louis Circuit Court, THAYER, J. *Reversed and judgment.*

GARESCHÉ & HOBEIN, for the appellant: If the wife suffered such indignities as to render her condition intolerable she was justified in leaving him. And this even if they were not such indignities as would form a basis for divorce, since causes may exist sufficient to justify the wife in leaving her husband even though insufficient to form the basis of an action for divorce. — *Gillinwaters* v. *Gillinwaters*, 28 Mo. 61; *Lyster* v. *Lyster*, 111 Mass. 327; *Hardin* v. *Hardin*, 17 Ala. 253; *Cornish* v. *Cornish*, 23 N. J. Eq. 208; *Schrock* v. *Schrock*, 4 Bush, 682;

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Pidge v. *Pidge*, 3 Metc. (Mass.) 258. And there can be no desertion unless objection be made by the party deserted, and his or her consent may be inferred from conduct. — *Simpson* v. *Simpson*, 31 Mo. 24; *Cornish* v. *Cornish*, 23 N. J. Eq. 208; *Meldowney* v. *Meldowney*, 27 N. J. Eq. 328; *Moores* v. *Moores*, 10 N. J. Eq. 276; *Thorpe* v. *Thorpe*, 9 R. I. 56; *Benkert* v. *Benkert*, 32 Cal. 470; *Pidge* v. *Pidge*, 3 Metc. (Mass.) 258; *Powell* v. *Powell*, 29 Vt. 149. Where the husband's conduct has been such as to result in driving his wife out of the house, he himself is guilty of desertion. — 1 Bishop's Mar. & Div. (6th ed.), sect. 785; *Kinsey* v. *Kinsey*, 37 Ala. 395; *Schrock* v. *Shrock*, 4 Bush, 684; *Harding* v. *Harding*, 33 Md. 345; *Palmer* v. *Palmer*, 12 N. J. Eq. 91; *Pidge* v. *Pidge*, 3 Metc. (Mass.) 258.

W. F. DOYLE, for the respondent.

THOMPSON, J., delivered the opinion of the court.

The plaintiff brought this action for divorce on the ground of abandonment. The answer is a general denial, and also a count in the nature of a cross-bill averring that "for more than one year prior to the filing hereof, the plaintiff, without any reasonable cause, has deserted, and absented himself from defendant, and has utterly failed, neglected, and refused to provide for defendant's support, wherefore defendant prays to be divorced," etc.

The evidence shows that the parties intermarried on the 26th of August, 1873, and that they lived together as husband and wife a little over three months, until December 4, 1873, when the defendant left the plaintiff's house and has never since returned; that four days after thus leaving she brought an action for divorce on the ground of ill-treatment, in which action the circuit court at special term rendered a judment for the defendant (now plaintiff); that on appeal to the general term this judgment was reversed; that on appeal from the general term to this court the judg-

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ment of the general term was reversed and the judgment of the special term affirmed, the court here being of opinion that the evidence did not show that the defendant had offered such indignities to her as to render her condition intolerable within the meaning of the statute. 2 Mo. App. 17. The record proper in the former suit for divorce, including the opinion and mandate of this court, was put in evidence upon the trial of the present action.

It also appeared that, since the rendition of the judgment of this court in the former case, which was in the year 1876, the plaintiff and defendant have continued to live apart from each other and to hold no communication whatever with each other. The plaintiff, has made no effort or solicitation, either directly or through friends, to induce the defendant to return to his bed and board; nor has the defendant offered to return, or made the slightest attempt at reconciliation. The plaintiff, in his testimony, gives as his reason for not making any attempt at reconciliation, that the defendant had brought the former suit for divorce against him, and had made charges therein which were false; and the defendant gives no substantial reason for refusing to return to him, except the ill-treatment which induced her original departure.

1. It is perceived that the present action is grounded upon the allegation that the defendant has absented herself from the plaintiff without a reasonable cause for the space of one year, within the meaning of section 2174, Revised Statutes. It is urged on behalf of the plaintiff that the reasonable cause mentioned in this statute, which will justify a permanent separation of a wife from her husband, or husband from his wife, must be such a cause as would, under some other clause of the same section, constitute a ground of divorce. In *Gillinwaters* v. *Gillinwaters* (28 Mo. 61), it was said by Scott, J., in giving the opinion of the court: "The conduct of a husband towards his wife may be such as would warrant her in leaving him, al-

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though it would not entitle her to a divorce." Although that may have been an *obiter dictum*, as the learned counsel for the plaintiff argues; yet we do not feel at liberty to hold that a distinct expression of doctrine which is found in an opinion of the supreme court is not the law, unless we find that it is distinctly overturned by what is held or said in a subsequent decision of the same court. In *Hoffman* v. *Hoffman* (43 Mo. 547), the case resembled somewhat the case now before us. The action was brought by the husband for divorce on the ground of absence, under the statute. The wife, in a cross-petition, set up cruelty as an excuse for the absence. The court, after discussing at some length the doctrine of recrimination, used this language: "The least that can be required, if we would make the provisions of the statute harmonize with the principles of the law in other respects, would be to compel the parties to come into court with hands so far clean, at least, that the opposite party is not entitled to the same redress from them. If both parties have a right to divorce, neither party has. The court must discriminate between them; must say which is the injured party, and which is entitled to relief. Neither the legal inference can be drawn as to both, nor the remedy applied to both." Further on, in the same opinion, this language is used: "In cross-petitions, or in petitions by one party, the court is bound to look into the conduct of both husband and wife; and if the party seeking a divorce has been guilty of conduct that would entitle the opposite party to one, he or she must fail, notwithstanding the evidence might otherwise be sufficient. This rule does not apply to conduct, however reprehensible, that would not entitle the other party to a divorce. His or her conduct must come within some of the cases enumerated in the statute." There may be a difficulty in reconciling the views expressed in these two cases, and we shall not attempt to do so, because the facts of this case disclose a ground which places it outside the doctrine of the latter

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case, and which, in our opinion, renders it impossible to extend to the plaintiff the relief which he seeks. The judgment of the circuit court granting him a divorce, recites that he is an innocent and injured party. Since the act of March 12, 1849, it has not been necessary, in order to entitle the plaintiff to a divorce, that he should be found to be an innocent as well as an injured party, the word *innocent* having been omitted from the statute as then amended. What the legislature meant by omitting the word *innocent*, is a matter of conjecture. It may have been because it had been held, or supposed, that a spouse whose offence had been condoned, was not an innocent party. However this may be, it was said by the supreme court in *Hoffman* v. *Hoffman*, (43 Mo. 547, 549), that "the statute should receive the same construction in this respect as before the change; at least no better character should be required of a party seeking a divorce, and we are not inclined to allow it to a person sustaining a worse one." It was in the present case, at least, necessary for the court to find and adjudge that the plaintiff was an injured party; but in our opinion the record does not sustain this finding. It clearly appears from the record that, while he may not have offered such indignities to her as justified her departure and her continued absence from his abode, yet he did impose upon her such gross indignities as placed him very much in the wrong. It was a second marriage, and he had seven children living by a former wife. Soon after the marriage he displaced the defendant as mistress of his house and installed his daughter in her stead. So far as we can see, he did this without other justification than the claim that she was extravagant in the expenditure of money. This was in itself an indignity of a very gross nature, and of a character to inflict a succession of wounds upon the pride of the defendant from day to day so long as it should continue. Then it is clear of doubt that in his conversation with her, he used profane and abusive language, such as

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must have greatly wounded the sensibilities of a newly wedded wife. For five weeks before their separation, he refused to speak to her. Passing by other charges made by the defendant which the conflicting testimony leaves in doubt, we are able to say that this course of treatment places him so far in the wrong that, while it did not in law justify her departure and continued absence from his dwelling, it did make it incumbent upon him, before asking a court of justice to annul the marriage on the ground of such departure and absence, to place himself *rectus in curiâ* by making in good faith some attempt at reconciliation. His reason for not making such attempt, that she had brought the former action for divorce against him and had made charges against him therein which were false, though possessing some weight, is not fully borne out by the conclusions of this court upon the facts in its opinion in the former case, written by Judge BAKEWELL, which the plaintiff himself put in evidence in the present case. It is evident from the opinion of Judge BAKEWELL in that case, that the plaintiff (now defendant) was not regarded as having founded her action upon perjury; and though she may have over-stated the facts in her petition and in her testimony, there was clearly a foundation for much that she had alleged and sworn to. She exhibited a case which, while not justifying a permanent separation from him against his will, entitled her to much sympathy and may have excused a *temporary* separation. Then followed the former divorce suit; and it appears that, except at the trial of that action, they never met but once. They continued to live in the same town and to hold no communication with each other for seven years, during all which time he contributed nothing to her support. *Volenti non fit injuria.* A person can not be injured in a legal sense by a state of things which he has voluntarily produced and continued, and to which he freely consents. It is clear of all doubt on this record, that the defendant was induced to

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leave the home of the plaintiff on account of ill-treatment by him, and that from that day to this he has done nothing in the way of reparation, nothing which indicates on his his part a willingness to have her return. On the contrary it sufficiently appears, that he is unwilling to have her return and resume the duties of a wife. She is therefore to be taken and deemed as remaining away from his home by his consent and desire, and this consent and this desire, are of themselves a reasonable cause for her continuing to remain away. *Simpson* v. *Simpson*, 31 Mo. 24.

2. The remaining question is, whether the defendant was entitled to a divorce upon her cross petition. It is clear that she was not. The only ground of divorce which she sets up is, that "for more than one year prior to the filing thereof the plaintiff, without any reasonable cause, has deserted and absented himself from defendant, and has utterly failed, neglected, and refused to provide for defendant's support." The defendant's evidence fails to sustain any of these allegations. She, and not he, left the family residence, and has ever since remained away from it. She left under grievous provocation, but it was conclusively adjudicated by this court in the former action that this provocation did not render her condition intolerable and was hence not a ground for divorce. It may, as already suggested, have excused a temporary withdrawal; but before she can turn it into a desertion on his part, — if she could do it at all, which we do not decide, — she must at least show that she has offered to return to him and has been repulsed. It is argued, on the authority of decisions in other states, that where a husband repels his wife from him by intolerable indignities, he, and not she, is guilty of desertion. Whether this is a correct view or not, we do not feel called upon to decide; but we are clear that, where the indignities are not of themselves a sufficient cause for divorce, it would be absurd to hold that the wife can, by remaining away in consequence of such indignities, create for herself

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a cause for divorce, upon the theory that, by so electing to remain away from her husband, he incurs the guilt of deserting her. If the indignities themselves are not a sufficient cause for divorce, a new cause for divorce can not be extracted from them by the voluntary conduct of the party seeking the divorce. Her position in this respect is substantially the same as his; she remains away from him by her free will and accord, having the opportunity to return to him, or at least to make the attempt. Ordinarily the husband is not bound to follow the wife and live with her in what place soever she may choose to live; but he is the head of the family, and she is ordinarily bound to follow him and live with him; and where she voluntarily leaves him and remains away from him, he does not desert her because he does not choose to follow her and live with her. The defendant can not make a separation which is prolonged by her voluntary act, and which she has never made an effort to terminate, a ground of complaint against her husband; she is no more injured than he is by a state of things to which she voluntarily consents. Nor can she claim a divorce on the ground of his refusal to support her, because she does not attempt to show that she ever requested him to do so, or that he ever refused.

The case then lies in a small compass: These spouses have quarreled and separated. They remain absent from each other, and hold no communication with each other, by mutual consent. Both voluntarily agree to the separation; therefore neither can charge it as a wrong against the other, and neither can make it a ground for claiming a divorce.

The judgment of the circuit court is reversed; and the court here proceeding to give the judgment which the circuit court should have given, renders its judgment that the plaintiff take nothing by his petition, and that the defendant take nothing by her answer. It is so ordered. All the judges concur.

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Separate opinion by Rombauer, J.

I concur in the result reached in the foregoing opinion, and believe the decree now rendered by this court is proper, and warranted by the record. In doing so, however, I desire to place myself strictly on the ground that the record warrants the conclusion that the separation of the wife from the husband continued with his consent. This brings the case within the rule of *Simpson* v. *Simpson*, (31 Mo. 24), which has never been denied.

The position taken in *Gillinwaters* v. *Gillinwaters* (28 Mo. 61), that "the conduct of a husband towards his wife may be such as would warrant her in leaving him, although it would not entitle her to a divorce, is unquestionably adapted to ensure that mutual forbearance between husband and wife which is best designed to foster domestic peace and happiness, and it is to be deplored that the court did not adhere to it. But I can not reconcile that position with the subsequent decision of *Hoffman* v. *Hoffman* (43 Mo. 547), where the same court, in substance, held that husband or wife do not cease to be the injured party, by conduct however reprehensible, unless it be such as entitles the other party to a divorce. I can not therefore assent to that part of the opinion of my associates which attempts to reconcile the two cases above cited.

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E. Rhodes, Appellant, *v.* E. T. Farish, Administrator, Respondent.

February 10, 1885.

1. **Statute of Limitations — Absence from the State.** — An "absence from the State" such as will, for a considerable period, render it impossible to obtain such a service of process as will support a general judgment, is such an absence as will interrupt the running of the statute of limitations.

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2. —— APPELLATE PRACTICE.—The evidence in support of the defence of the statute of limitations being definite, undisputed, and not open to suspicion, an appellate court will direct the proper judgment to be entered by the trial court.

APPEAL from the St. Louis Circuit Court, THAYER, J.

Reversed with directions.

MCENTIRE & LOEVY, for the appellant: The debtor need not abandon his domicile, but it is sufficient if he is beyond the reach of service of ordinary process, the statute is thereby interrupted.—*Johnson* v. *Smith*, 43 Mo. 499; *Venuci* v. *Cademartori*, 59 Mo. 352; *Garth* v. *Robards*, 20 Mo. 524; *Miller* v. *Tyler*, 61 Mo. 402.

E. T. FARISH, *pro se.*

THOMPSON, J., delivered the opinion of the court.

On the 9th of December, 1882, the plaintiff exhibited for allowance against the estate of Wharton T. LaBaume, deceased, the following due bill:—

"Due Emerson Rhodes, three hundred and seventy-five gold, which I promise to pay on the first day of November, eighteen hundred and seventy-one.

"W. T. LABAUME.

"June 13, 1871."

The evidence shows, without contradiction, that the signature to this due bill was that of the deceased. It is admitted that when it became due the premium on gold was eleven and seven-eighths per cent.

The only defence was the statute of limitations. It will be perceived that the time which intervened between the 1st of November, 1871, when the due bill became due, until the 9th of December, 1882, when it was exhibited for allowance to the administrator of LaBaume, deducting one month and thirteen days which elapsed between the death of LaBaume and the grant of the letters of administration, was ten years, eleven months, and twenty-six days. To take the case out of the statute of limitations, the plaintiff,

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by depositions and the oral testimony of witnesses, endeavored to show such a state of facts as would bring the case within three exceptions of the statute of limitations, as follows: 1. The exception contained in the first clause of section 3236, Revised Statutes, relating to cases where the defendant, being a resident of this state, is absent therefrom at the time when the cause of action accrues. 2. That contained in the second clause of the same section, which provides that "if after such cause of action shall have accrued, such person depart from and reside out of the state, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action." 3. That contained in section 3244, relating to cases where the defendant absconds, conceals himself, or does other improper acts, which prevent the commencement of the action. We think we may lay out of view the first and last of these grounds of exception, because we are clear that, upon the second ground, the case, upon the undisputed evidence, is not within the statute of limitations.

In determining whether a case is within the exception created by this clause, it is necessary to bear in mind the purpose of the statute, which was that the plaintiff should not lose his right of action by the bar of the statute of limitations, if, during any substantial period of the time during which the statute otherwise would have been running, the defendant had departed from, or resided out of, the state, so that ordinary legal process, such as would afford a foundation for a personal judgment against the defendant, could not be served upon him. *Venuci* v. *Cademartori*, 59 Mo. 352; *Garth* v. *Robards*, 20 Mo. 524. In order to determine whether a given case falls within this exception of the statute, it is therefore necessary to read the statute in connection with section 3489, which relates to the manner of serving ordinary process on defendants in civil actions; and, in inquiries of this kind, the supreme court has so read it. The third clause of section 3489 enacts

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that "a summons shall be executed, except as otherwise provided by law * * * by leaving a copy of the petition and writ at his usual place of abode, with some person of his family over the age of fifteen years." When, therefore, the defendant had become temporarily a non-resident of Missouri, had even engaged temporarily in business in another state for several months, but left behind him in this state a dwelling-house, in which his family, consisting of a wife and several children lived during his absence, and had other real property in this state, the supreme court had no difficulty in holding that the case was not within the exception of the statute, because the plaintiff's writ, under the law, could have been served at his place of residence in this state, so as to warrant a general judgment against him. *Garth* v. *Robards*, 20 Mo. 524. So, where the defendant, having a family in this state and owning real property here, conveyed such property to a trustee for his wife, and then went to Italy, leaving his wife and family at his former residence here, and remained in Italy for eleven years, after which period he returned, it was held that the case was not within this exception of the statute, but that the statute continued to run in his favor; because a service of a summons, such as would have have supported a general judgment against him, could have been made at his residence here. *Venuci* v. *Cademartori*, 59 Mo. 352. On the other hand, where the defendant left his home in Greene County, in this state, in 1862, and was absent from the state until 1865, and his family, immediately after he had left the state, removed from the farm on which they had resided at the time when he left them, and went to the house of a relative in Lawrence County, and remained there until 1864, and then removed to Saline County and remained there until 1865, and then returned with the defendant to Greene County, — it was held that the statute ceased to run during the defendant's absence from the state; because, although his absence was temporary, yet, under

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the rule in *Tiller* v. *Abernathy* (37 Mo. 196), after the removal of his family from their residence in Greene County, he had not until his return any "usual place of abode" within this state, where ordinary legal process could be served upon him. *Miller* v. *Tyler*, 61 Mo. 401. These decisions show clearly the meaning of the statute, and give point to what the supreme court said in another case, that "the residence" spoken of in the statute, is not synonymous with the word "domicile." "A man may have his 'domicile' in St. Louis and have a right to vote at elections, etc., and at the same time reside in Europe; and this European residence may be prolonged for years without affecting his St. Louis domicile. So a debtor may depart from and reside out of the state, within the meaning of the statute, without abandoning his domicile in Missouri. But the debtor's intentions, which enter so largely into the question as to domicile, are of no benefit to the creditor, so long as the debtor keeps out of the reach of process, and thus avoids a personal judgment against himself. Nor is it conceded that the question of intention is very material. It is the fact of absence beyond the reach of process for a substantial period of time, and for a purpose not transient in its character, that is important. *Johnson* v. *Smith*, 43 Mo. 499, 501. If we apply this test to the facts of the present case, it will appear that the defendant had a general residence in Ralls County, Missouri, at the time the note fell due in the fall of 1871, though he may have been, in point of fact, residing in Kansas temporarily at the time; that in the spring of 1872 he left Ralls County, Missouri, with the express intention of going to live in St. Louis. The testimony next enables us to get track of him in St. Louis about the year 1876, from which time until his death, in 1881, he pursued the business of a commercial traveler, with the exception of one or two intervals, when he appears to have been out of employment. This business took him out of this state for long periods of

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time; and when he would return to St. Louis, at intervals between his trips and at other times when out of employment in St. Louis, he appears to have stopped at various hotels and boarding places or at bachelor's quarters in a rented room, and to have had no fixed place of residence anywhere. He was a bachelor and had no family; and though he had relatives in St. Louis, he did not live with them, and was not on good terms with them. All the testimony goes to show that, during the time when St. Louis might be called his general residence, he had "no usual place of abode" in this city where a summons could have been served in his absence under section 3489, Revised Statutes, and no family with a member of whom a copy of the petition and writ could have been left, as the statute provides. Then, there is undisputed testimony in the case which locates him outside of this state for periods of time which are more than sufficient to take the case out of the statute of limitations. His brother testifies of his own knowledge that, during three winters, he thinks, those of 1872, 1873, and 1874, the deceased lived in Bonham, Texas. Mr. Hinde testifies, that in August, 1876, he secured the deceased a place as traveling man with Monks & Sons, of St, Louis, and that he made one trip for them in Texas which lasted from four to six months; that in the spring of 1878 he was employed by a St. Louis grocery house, and made a long trip for them through Texas, the Indian Territory and Arkansas, which lasted four or five months; then, after a period of idleness, he went to work for John Endres & Co., of St. Louis, for a short time in the spring of 1880, traveling for them in Arkansas and Texas. Testimony introduced for the defendant shows that he was still in the employ of John Endres & Co. on June 30, 1881, when he died in Colorado. Other testimony is to the general effect that he had no particular place in St. Louis where he could with certainty be found, and one witness testified that, having a legal demand against him in 1876, he endeavored for two or three years

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without success to find him in St. Louis; that when he did find him, the deceased told witness that he had just arrived from a trip, and promised to come and see witness, but did not keep his promise, and when witness went to find him a day or two afterwards, he had again left the city.

There is in the record nothing which tends to contradict this testimony. The fact shown by the defendant, that at the time of his death the deceased had on deposit in three different banks and in one commercial house in St. Louis, money in the aggregate amount of about $12,000, has no tendency to show where the actual residence of the deceased was during the period of time under inquiry, and does not tend to contradict the testimony of the plaintiff, which shows that the deceased was absent for frequent and long intervals during his residence in Missouri, during the ten years subsequent to the maturity of the note. The testimony places him in the category of men who have become so numerous of late years, that we, living in a large commercial community, are more or less familiar with their habits. The commercial traveler is necessarily abroad in the ordinary pursuit of his business during the greater part of his time. If he have a permanent residence here and a family who remain at such residence during his absence, his intervals of absence during his "trips," however frequent or long, would not bring his case within the exception of this statute of limitations; because "his usual place of abode" would be in St. Louis, and process could be served here at such place of abode upon a member of his family over fifteen years of age. But it is not so if he is a bachelor having no usual place of abode here, but carrying his residence with him, whether away on his trips or back at St. Louis, and making his home at any hotel, boarding house, or rented room, where he may choose to put up. This was the case with the deceased, and the evidence leaves no room to question that there were long intervals sufficient to take this case out of the statute of limitations,

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and much more, during which legal process could not be served upon him within this state except at such periods as he could be caught here during the intervals between his trips or between his different employments. It has been well said, speaking of this statute, that "as a mere temporary absence does not stop the running of the statute (*Garth* v. *Robards*, 20 Mo. 523), so a mere temporary return or flying visits, after the residence is changed, will not stop the running of the exception." *Johnson* v. *Smith*, 43 Mo. 499, 501; *Cook* v. *Holmes*, 29 Mo. 61. It is not enough that the plaintiff might have been able to catch the defendant at his domicile in Ralls County, or in St. Louis, by the aid of a detective. It is sufficient that there were frequent and long intervals of absence during which the ordinary process of law could not have been served upon him, and that these intervals, added together and deducted from the time which elapsed between the maturity of the note and the exhibiting of it for allowance to the administrator, leaves a period of less than ten years.

A number of declarations of law were given by the court for both parties. We think that it is not necessary to notice any of them. If they are read in connection with the finding and judgment of the court, which were given for the defendant, they clearly indicate that the theory of the court was, that the defendant had his residence in Missouri during the interval which elapsed between the maturity of the note and its presentation for allowance, and that in the prosecution of his business, though he was "occasionally and temporarily absent," yet his absences were not "for a special period of time," or "for purposes not transient in their character." Our view of the evidence is, that it affords no basis for such a finding. We do not presume to perform the office of a jury, or of a judge sitting as a jury, and to weigh evidence or decide upon the credibility of witnesses; but the evidence of the facts above stated being clear, undisputed, and untainted with any circumstance of sus-

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picion, it is competent for us to declare the law applicable to the facts thus established, and not to send the cause back and put the plaintiff to further delay and expense in getting his just demand.

We accordingly reverse the judgment of the circuit court and enter judgment for the plaintiff here for the amount of the note with eleven and seven-eighths per cent added thereto, the same being the admitted premium on gold at the time when it fell due, together with interest upon this aggregate amount from the first day of November, 1871, until the date of this judgment, the same to be certified to the probate court. It is so ordered. All the judges concur.

Supplementary Order. March 3, 1885. The judgment of the circuit court will be reversed, and the cause remanded to that court with directions to enter judgment in favor of the plaintiff for the amount of the note, with eleven and seven-eighths per cent added thereto, together with interest on this aggregate amount from November 1, 1871, until the date of such judgment. Such judgment to be certified to the probate court. It is so ordered. All the judges concurring.

J. J. HORN, Appellant, *v.* C. PETELER, Respondent.

February 10, 1885.

LANDLORD AND TENANT — WAIVER. — The tenancy being from month to month, the taking of the tenant's negotiable note for rent in arrears and the acceptance of rent for subsequent months is a waiver of the right of the summary action under the statute for the arrears of rent.

APPEAL from the St. Louis Circuit Court, ADAMS, J.

Affirmed.

WILLIAM E. JONES, for the appellant.

E. B. WOLFF, for the respondent.

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THOMPSON, J., delivered the opinion of the court.

This is a landlord's summons under the statute. The tenancy is a tenancy from month to month. The rent is $15 per month. On July 15, 1883, the landlord accepted the negotiable promissory note of the tenant for $30, the same being the amount of two month's rent then past due. The note does not express the consideration for which it was given. Thereafter the tenant paid the monthly rent regularly as it fell due down to the month of March, 1884, at which time he made default in the payment of one month's rent. The landlord thereupon demanded of him as rent $45, being the two months' rent for which the note was given, and also the rent for the month of March, which was in arrear. He, at the same time demanded possession of the premises. The tenant tendered $15, the rent in arrear for the month of March, within the time prescribed by the statute, which tender was refused. On the trial in the circuit court, to which the cause had been appealed from the justice, the landlord surrendered the note to the court. The cause having been submitted to the court without a jury, judgment was given for the defendant.

It will be perceived that the only question is, whether the taking of a promissory note for past due rent and the acceptance of rent subsequently accruing, is a waiver of the forfeiture by the tenant of his right to possession which took place when the rent for which the note was given had become in arrear, and of the right which then accrued to the landlord of proceeding against the tenant under the statute. We have no doubt that it is. The question is governed by the doctrine laid down by this court in *Wolff* v. *Shinkle* (4 Mo. App. 197, 199), in which Hayden, J., said: "The remedy is statutory, special in its nature, and the proceeding summary. The object is to give the land-land a means of speedily obtaining restitution of his premises. The ground of the restitution is the failure to pay rent, as such. The question is, when by the landlord's

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own act the rent has ceased to be such, has lost its distinctive character as rent, and become a general indebtedness, whether the landlord can proceed under the statute. Here the supposition is, that the landlord has received his rent for the year immediately preceding the bringing of this suit. He has thus separated his claim from any present demand in the nature of newly accrued rent, and given to it the character of an ordinary chose in action. Upon the principle of waiver as applicable to the acts of the landlord, it may well be held that he has surrendered his right to proceed under the act." The more general principle laid down by the supreme court in *Garnhardt* v. *Finney* (40 Mo. 449, 460), seems equally to apply. That principle is that the acceptance of rent, after full notice or knowledge of the failure for which the forfeiture might have been claimed, is such a waiver of the forfeiture as prevents it from being afterwards asserted. Forfeitures are not favored, and in respect of the question what acts amount to a waiver of the landlord's right to insist upon a forfeiture of the term, it was said in that case, by Holmes, J., that "slight acts are deemed sufficient for this purpose, and any recognition of a tenancy subsisting after the right of entry has accrued and the lessor has notice of the forfeiture, will have the effect of a waiver. A man may be estopped by acceptance of rent." Whether upon the ground on which this court proceeded in *Wolff* v. *Shinkle* (4 Mo. App. 197), that by accepting the note the debt lost its distinctive character of rent and became an ordinary debt, or on the doctrine of *Garnhardt* v. *Finney* (*supra*), that the subsequent acceptance of rent was a waiver of the precedent forfeiture, the result is equally the same.

The judgment is affirmed. All the judges concur.

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E. ACTON, Respondent, *v.* W. DOOLEY, Appellant. 16 441 51 262

February 10, 1885. 16 441 65 422

1. **PRACTICE — AMENDMENT — VERDICT. — The trial court may, at any time, from competent evicence, amend a verdict so as to make it express the manifest intention of the jury.**
2. **—— PETITION. — In an action of ejectment, where the petition erroneously uses the word "east" for the word "west," in describing the land, the court may, at the next term, to which the motion for a new trial has been continued, permit an amendment of the petition, and may correct the verdict to conform thereto.**

APPEAL from the St. Louis Circuit Court, BARCLAY, J. *Affirmed.*

WALKER & WALKER, with whom are LUCIEN EATON and J. M. HOLMES, for the appellant: After the verdict has been received and the jury discharged, no amendment in substance is proper. — *Wright* v. *Philips*, 2 Greene, 191; *Snell* v. *Navigation Co.*, 30 Me. 337. Whenever a plaintiff amends his declaration the defendant has an election to plead *de novo.* — *Webb* v. *Wilkie*, 1 Cairnes' Rep. 104; *Neidenberger* v. *Campbell*, 11 Mo. 357.

FISHER & POWELL, for the respondent: The amendment was properly allowed. — Rev. Stats., sects. 3565, 3567, 3569; *Bruner* v. *Marcum*, 50 Mo. 405; *Horskotte* v. *Menier*, 50 Mo. 158; *Jones* v. *Whilsett*, 79 Mo. 188; *Young* v. *Glascock*, 79 Mo. 574.

THOMPSON, J., delivered the opinion of the court.

This is an action of ejectment. It is the same case which was before this court and reported in 6 Mo. App. 323, and which was before the supreme court and reported in 74 Mo. 63. It was held by the supreme court that the plaintiff was not estopped from recovering the land in

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controversy by his conduct in relation thereto. In the opinion of this court by LEWIS, P. J., and also in the opinion of the supreme court by Henry, J., the facts of the case and the real controversy between the parties were stated, from which it appears that the only controversy related to the boundary between the plaintiff's lot and the defendant's lot, the plaintiff claiming that the defendant had built his house and fence so as to overlap the boundary line and encroach upon the plaintiff's lot to the extent of from four to four and one-half inches. The petition, as it stood at the time of the former trial and also at the time of the trial from which this appeal is taken, describes the land as follows: "Being a strip of ground on the east side of lot number five (5), in block number nine (9), in city block number nine hundred and fifty (950), of William C. Carr's addition to said city of St. Louis, Missouri, of the width or front on Carr Street of four and one-fourth inches ($4\frac{1}{4}$) by a depth of one hundred and fifty-three feet and nine inches to an alley; commencing at the southeast corner of said lot number five (5), thence running east four and one-fourth inches along the northern line of Carr Street in said city; thence running northwardly $153\frac{4}{12}$ feet to a point in the southern line of the alley north of said lot five (5), four inches west of the northeast corner of said lot number five (5); thence east four inches along the southern line of said alley to the northeast corner of said lot number five (5); thence south along the eastern line of said lot number five (5) one hundred and fifty-three and $\frac{9}{12}$ feet to the place of beginning." Tracing these calls on paper, it is seen that the land which the petition calls for is in the shape of two long triangles touching each other at a common point, so as to form, not one strip of ground, but two triangular pieces lying (so to speak) between the arms of a narrow and elongated letter X. This will appear

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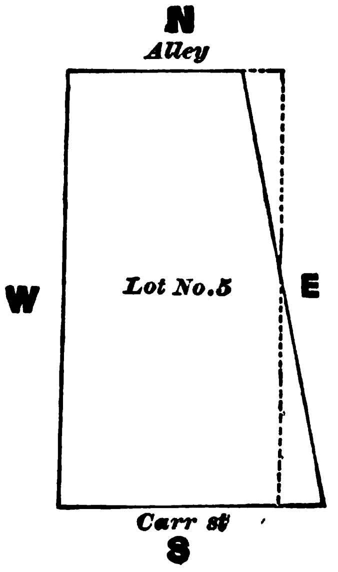
from the following diagram, of which the dotted line is the eastern boundary of the plaintiff's lot, as claimed by him:



The answer was a general denial and a plea of the statute of limitations. It was filed on the 26th of April, 1877. There was a reply filed on the same day. On the issues thus made up the cause again went to trial on the 9th of April, 1884, before a jury. The plaintiff offered in evidence a stipulation of the parties to the effect that the parties derived their proper title by mesne conveyances from Wm. C. Carr, and his grantees; the defendant Dooley to lot four, and the plaintiff Acton to lot five, of block nine (now city block 950) of Wm. C. Carr's addition to the city of St. Louis, according to the plat thereof now of record in the office of the recorder of St. Louis County, to which plat reference is made. This stipulation, not to restrict or limit the range of evidence of either party. He also offered evidence tending to show that the true boundary line

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between lots four and five of block nine of Carr's * * * addition to the city of St. Louis, was four and one-fourth inches east of the ground occupied by defendant at the front of said lot, and four inches east of the ground occupied by defendant at the rear of said lot, and tending to prove plaintiff's right to possession of the land as described in the petition, *as amended and now on file.* The defendant, to sustain the issue on his part, offered evidence tending to show that the boundary line between said lots corresponded with the eastern line of the ground actually occupied by the defendant. This was all the evidence.

The court, at the instance of the plaintiff, gave the jury the following instructions: "If the jury believe from the evidence that the strip of ground in controversy belongs to and is a part of lot No. 5, in block No. 9, of William C. Carr's third addition to the city of St. Louis, and that the defendant entered into and upon said land at or prior to September 28, 1875, and held possession of the same against plaintiff on said last named date, then the jury will find for the plaintiff. If the jury find for the plaintiff, they will state in their verdict the amount of the land sued for herein for which they so find in his favor, and they will then assess the plaintiff's damages at one cent and the monthly rents and profits of said premises at the sum of one cent." To the giving of which instruction the defendant excepted.

The defendant then requested the court to give the following instruction: "If the jury find from the evidence that the strip of ground in controversy is within the limits of lot No. 4, of block No. 9, of Wm. C. Carr's third addition to the city of St. Louis, according to the original monuments and land marks placed to define the plat of said addition, and as originally surveyed and recorded, the jury will return a verdict for defendant." Which instruction the court refused to give, and the defendant excepted.

The court then gave, at the instance of the defendant,

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the following instruction: "The burden of proof is on the plaintiff Acton to establish affirmatively his claim to the strip of ground in controversy. Hence, if Dooley has paper title or deeds for lot No. 4, and Acton like title to lot No. 5, and if the strip of ground in controversy was, prior to the institution of this suit (September 28, 1875), occupied and possessed by Dooley, the burden of proof is on Acton to show by a preponderance of evidence that such occupation and possession by Dooley are actually on lot 5, and not on lot 4. And in forming their verdict, the jury will take into account all the facts and circumstances of the case as brought out in the evidence brought before them. And if Acton fails to show by a preponderance of evidence that said occupation and possession by Dooley of said strip are actually on lot 5 and not on lot 4, the jury will return a verdict for defendant."

Thereupon the jury returned a verdict in words and figures as follows: "We, the jury in the above entitled cause, find for the plaintiff, entitling him to the possession of the following described premises, situated in the city and county of St. Louis and state of Missouri, to wit: Being a strip of ground on the east side of lot number five (5) in block number nine (9), of city block number nine hundred and fifty (950), of Wm. C. Carr's addition to said city of St. Louis, Missouri, of the width or front on Carr Street of four and one-fourth inches ($4\frac{1}{4}''$) by a depth of one hundred and fifty-three feet and nine inches to an alley; commencing at the southeast corner of said lot number five (5); thence running east four and one-fourth inches along the northern line of Carr Street in said city; thence running northwardly $153\frac{9}{12}$ feet to a point in the southern line of the alley north of said lot five (5) four (4) inches west of the northeast corner of said lot number five (5); thence east four inches (4) along the south line of said alley to the northeast corner of said lot number five (5); thence south along the eastern line of

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said lot number five (5) one hundred and fifty-three and nine-twelfths feet to the place of beginning; and being so entitled to the possession thereof, and assess the plaintiff's damages at one cent and the monthly rents and profits of said premises at the sum of one cent.

"ST. LOUIS, MO., 12th May, 1884.

"LOYD G. HARRIS, Foreman."

It will be perceived that the description of the land in this verdict is in the exact words of the petition, as it read when the case was tried and the verdict rendered.

A motion for new trial was then filed on the usual grounds, none of which questioned the form or sufficiency of the verdict. The bill of exceptions then recites as follows: "And afterwards, to wit, on the 7th day of July, A. D. 1884, the court, at the instance of plaintiff and against the objections of the defendant, permitted plaintiff to amend his petition by striking out the word 'east' in the eighteenth line of the first page thereof, and substituting in lieu thereof the word 'west.' To which ruling and order of the court the defendant, by his counsel, then and there at the time duly excepted; and thereupon afterwards, upon the said 7th day of July, A. D. 1884, the court, of its own motion, and against the objection of defendant, amended the verdict of the jury by striking out the word 'east' in the twentieth line of the first page thereof, and substituting in lieu thereof the word 'west.' To which ruling, order, and action of the court, defendant, by his counsel, then and there at the time duly excepted." And afterwards, on the 7th day of July, 1884, the court rendered judgment for the plaintiff, conformably to the petition and verdict as amended. Thereafter the defendant made a motion to set aside this judgment, on the ground (among others) that the court had no power to amend the verdict after it had been returned by the jury, that it erred in amending it, and that the court

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erred in permitting the plaintiff to amend his petition after verdict. This also was overruled and an exception saved.

We have deemed it important to quote from the record thus fully in order to show how the single question presented for decision arose, namely, whether the court erred in permitting the plaintiff to amend the petition after verdict, and in amending the verdict itself.

It is plain that the court committed no error in these rulings. As to the amendment of the petition, the statute, (Rev. Stats., sect. 3567) is a complete answer to the plaintiff's contention. For the purposes of this section final judgment is not deemed to have been rendered so long as a motion for new trial is pending; for although it is the practice to enter judgment immediately on the rendition of the verdict, yet during the pendency of a motion for new trial, although it is continued to another term, the cause is kept in the breast of the judge for the purposes of amendment as fully as though no entry of judgment had been made of record.

As to the amendment of the verdict by the court of its own motion, it is equally clear, both upon principle and authority, that it furnishes no ground of exception. Amendments are always regarded as a matter of sound discretion; and on appeal or error the rule with reference to discretionary action of the court below is, that such action is always presumed to be correct, unless the contrary plainly appear. In cases where the propriety of an amendment which was made in the trial court is questioned on appeal or writ of error, the record is examined, not for the purpose of seeing whether the ruling may be vindicated, but for the purpose of seeing whether grounds are offered for the conclusion that the discretion of the court was illegally exercised to the prejudice of the party complaining. Here the record not only affords no material for concluding that the

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discretion of the court was abused, but it affirmatively shows that the amendment of the petition was permitted in order to correct a manifest clerical error in the petition in one of the clauses therein, and that the amendment of the verdict was made in order to make it conform to the petition as thus amended. It is manifest that both amendments were made so as to make the petition and the verdict conform to the real issue which had been submitted to the jury, as understood by the court, by both parties to the controversy, and by the jury. This clearly appears from the recital in the bill of exceptions, that the plaintiff offered evidence tending to show that the true boundary line between lots four and five, of block nine, of Carr's addition to the city of St. Louis, was four and one-fourth inches east of the ground occupied by the defendant at the front part of said lot, and four inches east of the ground occupied by the defendant at the rear of said lot, and tending to prove plaintiff's right of possession of the land as described in the petition *as amended;* and that the defendant, to sustain the issues on his part, offered evidence tending to show that the boundary line between said lots corresponded with the western line of the ground actually occupied by the defendant. No language could make more clear and certain what the issue really was. In addition to this, the instructions of the court throughout, including those offered by the defendant, speak of the land in controversy as a "strip of ground." But two triangular pieces of ground which merely touch each other at a common point could not, by any enlargement or looseness in the use of terms, be called a "strip of ground."

If the question is considered upon authority, the conclusion is equally clear. The adjudged cases show that ever since the reign of Charles I. the courts have exercised freely the power of amending verdicts of juries so as to correct manifest errors, both of form and substance. *Chapman* v.

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Gale, 2 Lev. 22; *Eddows* v. *Hopkins*, 1 Doug. 376; *Harris* v. *Davis*, 1 Chit. 625; *Doe* v. *Perkins*, 3 T. R. 749; *Henry* v. *Mayor of Lyme Regis*, 6 Bing. 100; *Richardson* v. *Mellish*, 3 Bing. 334; *s. c.* on error, 7 Barn. & Cres. 819; *Clark* v. *Lamb*, 8 Pick. 415; *Murphy* v. *Stewart*, 2 How. (U. S.) 263, 279; *Hay* v. *Ousterout*, 3 Ohio, 384. These amendments have been contantly permitted after the lapse of the term at which the cause was tried, and even after writ of error brought and joinder in error. *Clark* v. *Lamb*, 6 Pick. 512, and 8 Pick. 414; *Murphy* v. *Stewart*, *supra*, and cases cited. In respect of the evidence upon which amendments of verdicts may be made, the broad rule was laid down by Mr. Justice Story in the cases last cited, and it is borne out by numerous authorities, that they may be made from the judge's notes of the evidence, or from any other evidence equally clear and satisfactory which may be submitted to the consideration of the court. Our own decisions, so far as they speak upon the question, go to confirm the general doctrine of the decisions in other jurisdictions, as above stated. *Bosse* v. *Thomas*, 3 Mo. App. 472, 479; *The State* v. *Steptoe*, 1 Mo. App. 19; *Ranney* v. *Bader*, 48 Mo. 539; *State ex rel.* v. *Knight*, 46 Mo. 83; *Henley* v. *Arbuckle*, 13 Mo. 209. A limitation of the rule is that the amendment must, in all cases, be such as to make the verdict conform to the real intention of the jury. It is scarcely necessary to say that the judge can not, under the disguise of amending the verdict, invade the exclusive province of the jury, or substitute his verdict for theirs; but it is not claimed that the court did this in this case, nor does the record afford any color for such a claim.

No other ground of error has been urged which requires discussion. The judgment is affirmed. All the judges concur.

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GEORGE W. MONTIETH, Respondent, *v.* GREAT WESTERN PRINTING COMPANY, Appellant.

February 10, 1885.

1. LIENS — WAIVER. — An expressly reserved lien on personalty is not impliedly waived by the giving of credit or the taking of other security.
2. —— TENDER — REPLEVIN. — A bailor can not take property upon which the bailee has a lien, without tendering the amount due although the bailee has demanded an excessive amount.

APPEAL from the St. Louis Circuit Court, BARCLAY, J.

Reversed and remanded.

LEONARD WILCOX, for the appellant: The defendant was entitled to the possession of the property sued for, when suit was brought, by virtue of an express contract to that effect. — Wells on Replevin, sects. 39, 121, 122, 688; 2 Greenl. on Ev., sect. 640; *Rich* v. *Ryder*, 105 Mass. 306, 310; *Dilworth* v. *McKelvy*, 30 Mo. 154; *Boutelle* v. *Warne*, 62 Mo. 353; Story on Bail., sects. 303, 422; *Hazard* v. *Hall*, 5 Mo. App. 584; 2 Pars. on Con. (7th ed.) 679, 530, 531; *Selby* v. *Hutchison*, 9 Ill. 332; *Loudon* v. *Taxing District*, 104 U. S. 771; *United States* v. *Behan*, 110 *Id.* 345. The existence of an express and valid agreement for a lien on the property in dispute is established by uncontradicted evidence and is admitted by the pleadings. — Overton on Liens, p. 5, sect. 7; 1 Pars. on Con. (7th ed.) 476; *Bunce* v. *Beck*, 43 Mo. 280; *Lindley* v. *Lacey*, 17 C. B. (N. S.) 587; *Thurston* v. *Thornton*, 1 Cush. 89. Defendant was entitled to a lien at common law on the time-table pages for the cost of setting up the type in such permanent form. — *Faulkner* v. *Harding*, 9 Mo. App. 12; Overton on Liens, 13, 14; *Scarfe* v. *Morgan*, 17 C. B. 281. Giving credit or taking collateral security is not conclusive evidence of the waiver of a lien; it is competent to show the intent of the parties. — *Pratt* v. *Eaton*, 65 Mo.

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157, 161, 165; *Cordova* v. *Hood*, 17 Wall. 1, 5, 7; 4 Waits' Act. & Def. 323, 324.

COLLINS & JAMISON, for the respondent: If any lien existed it was waived by defendant requiring plaintiff to furnish a written guaranty of payment of the bill, the security being payable at a distant day.—*Hewison* v. *Guthrie*, 2 Bing. (N. C.) 759. So also such lien, if any existed, was waived by the credit given.—*Hutchins* v. *Olcutt*, 4 Vt. 549; *Trust* v. *Pirson*, 1 Hilt. 292; *Chase* v. *Westmore*, 5 M. & S. 180.

ROMBAUER, J., delivered the opinion of court.

On the trial of this cause, the court instructed the jury to find a verdict for the plaintiff, which they did, and judgment was rendered accordingly.

It is an action of claim and delivery under the statute, and the general property in the articles sued for was admitted to be in the plaintiff. Unless we find, that the defendant has offered legal evidence of a right to the possession of the property at the date of the institution of the suit, the judgment of the trial court must stand.

The defendant's claim of such right of possession was threefold. It claimed to have a lien on the property by special contract, it claimed an artisan's lien by the common law, and it claimed the right of possession under a continuing contract for the performance of which it had been intrusted with the possession of the property by plaintiff.

The action of the trial court relieves us from considering any other question, except the one whether defendant has offered legal testimony to substantiate any of its three claims, as the weight of the testimony under the rule established in this state was a question exclusively for the jury, in the first instance.

It appeared in evidence that defendant had agreed by written contract, for a compensation specified in detail, to print for plaintiff a periodical known as the *Western Travelers' Guide*. The plaintiff was to furnish, all outside page

rules, and all the materials necessary to set up the railroad time tables. Standing matter was to be set up by defendant with its own materials, and the plaintiff was to have the right to have any standing matter electrotyped at any time at his own expense. Plaintiff was to make full payment of all bills within ten days after the first day of the month following that on which was made the delivery of the work for which said bill was incurred, so that work delivered in April, 1883, was to be paid for by the 10th of May, and so on, and written guarantee of payment satisfactory to defendant's manager was to be given by plaintiff, and was to be kept in force.

There was no lien on the material reserved in the written contract. Testimony was offered, however, of an oral contract, between the plaintiff and the defendant, to the effect that the defendant should have a lien on the material for its work. This evidence was competent, and was not even objected to. *Laudman* v. *Ingram*, 49 Mo. 214; *Van Studdiford* v. *Hazlet*, 56 Mo. 324; *Life Association* v. *Cravens*, 60 Mo. 390. There was evidence tending to show that this right of lien was reserved by defendant both before and after the execution of the written agreement, and even at the time when the guaranty therein provided for had been given. That a lien thus reserved expressly, was not impliedly waived by the giving of credit or security, and that the court could not as a matter of law declare that it was so waived, necessarily follows from the elementary proposition, that the proof of certain facts, negatives presumptions diametrically opposed to the facts proved. In *Hewison* v. *Guthrie* (2 Bing. (N. C.) 759), and *Hutchins* v. *Olcutt* (4 Vt. 549), relied on by plaintiff in this case, no facts were shown to negative the implied waiver. It is always competent to show by other facts that no waiver of this lien was intended. *Pratt* v. *Eaton*, 65 Mo. 165.

There was evidence which tended to show that defendant had a lien both by agreement and at common law (Over-

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ton on Liens, sects. 7, 44; 2 Kent Com. 637), and we are at a loss to determine from the evidence, as a matter of law, that it lost such lien. There was some controversy in the testimony concerning the demand made by defendant on plaintiff for the bill of the first month, and whether that demand was premature or not, or whether the bill presented was excessive or not. Whether the demand was premature was a question for the jury, but the mere fact that it was either premature or excessive, did not avoid defendant's lien for the amount justly chargeable to the plaintiff. If plaintiff desired to terminate the lien, all he had to do was to tender the amount which was justly due. *Scarfe* v. *Morgan*, 4 Mee. & W. 270. There is no pretence that he ever did this, on the contrary it stands conceded by the testimony, that he has paid nothing, and tendered nothing to defendant up to the present date, but has availed himself of defendant's work in subsequent editions of the *Travelers' Guide.*

There was also some evidence tending to show that plaintiff had been guilty of a breach of the contract, and some evidence which plaintiff claims conclusively establishes the fact that defendant was guilty of a subsequent breach of the contract by refusing him permission to electrotype standing matter at his own expense. But the breach, even if conceded, was not of a character to entitle the plaintiff to rescind the contract as a matter of law (*Selby* v. *Hutchison*, 9 Ill. 332); nor to retake the property by legal process, freed from defendant's lien, as a matter of law.

Under the equitable rule established in *Dilworth* v. *McKelvy*, in this state, all that the general owner has to do to retake his property from any one claiming a lien thereon, is to tender the amount justly due to the lienee. There was evidence in this case that the defendant had a lien on the property at the time when it was taken by the writ sued out by plaintiff, there is no evidence that any amount was ever tendered.

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Being of opinion that the court erred in taking the case of defendant from the jury, and that law and justice alike demand that defendant's claim be submitted to the triers of the fact, the judgment of the court is reversed and the cause remanded, to be proceeded with in conformity with this opinion. All the judges concur.

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G. O. HALL ET AL., PLAINTIFFS, Appellants, v. MULLANPHY PLANING MILL COMPANY ET AL., DEFENDANTS, Appellants.

February 10, 1885.

1. PRACTICE — SPECIAL VERDICT — JUDGMENT. — A special verdict of a jury which is responsive to the issue, is conclusive upon the court until it is set aside, and the court can not ignore such a verdict, make a different finding, and enter a judgment thereon.
2. —— Appellate courts, in reversing such a judgment, can not enter an original judgment on the special verdict, but must remand the cause.
3. —— Appellate courts can vacate judgments entered in common law and statutory causes, for legal errors only.
4. MECHANIC'S LIENS — MACHINERY — MORTGAGES — PRIORITY OF LIENS. — In so far as machinery furnished for a building of which it becomes a part enters into the completion of an unfinished building, the lien therefor, so far as the building is concerned takes precedence over a prior mortgage.
5. —— AFTER ACQUIRED PROPERTY. — A mortgage of after acquired property operates only by way of equitable estoppel, and is effective only as against the mortgageor and his privies in contract. It can attach to such property only in the condition in which it comes into the mortgageor's possession, and if the lien of a mechanic has them attached to it, such lien is entitled to priority over the mortgage.

APPEAL from the St. Louis Circuit Court, BARCLAY, J, *Reversed and remanded.*

W. B. THOMPSON, for the plaintiffs: The construction of the building was such that all the machinery attached to it constitute fixtures for the furnishing of which a lien exists under the mechanic's lien law of the state. — Rev. Stats., sect. 3175; *Smith* v. *Phelps*, 63 Mo. 585; *Rodgers* v.

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Crow, 40 Mo. 91; *Fleitze* v. *Veakery*, 3 Mo. App. 593; *Seibal* v. *Siemon*, 52 Mo. 363; *O'Brien* v. *Hanson*, 9 Mo. App. 545; *Todd* v. *Duncan*, 9 Mo. App. 417; *Kansas City Hotel Company* v. *Sauer*, 65 Mo. 288. The machinery was necessary to the completion of the building.—*Gray* v. *Holdship*, 17 S. & R. 313; Overton on Liens, sect. 545; *McGreary* v. *Osborne*, 9 Cal. 119; Ph. on Liens, sect. 177; *Goodin* v. *Elleardsville Hall*, 5 Mo. App. 289. The lien of the mechanic on an unfinished building is superior to that of a mortgage.—Rev. Stats., sect. 3174; *Reilly* v. *Hudson*, 64 Mo. 383; *Jones* v. *Swan*, 21 Iowa, 181; *Welgore* v. *Valentine*, 3 Col. 255; *Presbyterian Church* v. *Allison*, 10 Pa. St. 413; *Bailey* v. *Hull*, 11 Wis. 289.

G. M. STEWART and R. SCHULENBURG, for the defendants.

ROMBAUER, J., delivered the opinion of the court.

No theory is conceivable upon which the judgment of the trial court can be sustained in the absence of consent of all the parties.

The action was one upon an account against the Mullanphy Plaining Mill Company, for which a mechanic's lien had been filed. The lien was sought to be enforced against certain property for materials and machinery furnished. The mill company owned the equity of redemption in the property when the articles were furnished; but its equity had been foreclosed by public sale under the provisions of its trust deed, subsequent to the date when the articles were furnished, and the account of the plaintiff was filed as a lien, and prior to the trial of the cause. The manufacturing company was the owner of the property at the date of the trial, having acquired it from the purchaser at trustee's sale. These facts appeared by the pleading, and there was no controversy concerning them, nor was there any substantial controversy concerning the indebtedness of the mill

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company to the plaintiffs upon the account. The question litigated between the plaintiffs and the manufacturing company was, whether the plaintiffs were entitled to have any part of their account enforced against the property as a lien, and, if so, what part?

Upon the trial of the cause certain issues were submitted to the jury, by consent of parties, upon questions framed, the parties waiving a jury as to all other issues, and submitting it to the court on the evidence and findings made by the jury.

One of the questions submitted to the jury was: —

"1st. For what amount, if any, of new machinery furnished by plaintiffs and sued for herein are they entitled to, as a mechanic's lien under the instructions given?"

In answer to this question the jury returned a verdict as follows: —

1st. (enumerating items) "Balance, $1,475."

Upon the filing of the verdict the plaintiffs moved for judgment upon the verdict, and the defendants for a new trial.

These motions were continued for several terms, and never formally disposed of; but subsequently the court, without any retrial of the cause, made a judgment in the case, purporting to be founded on evidence and proofs adduced and the verdict of the jury in the cause, finding for the plaintiffs against the mill company for $1,850.61; and finding further, that they were entitled to a lien against the property for $895.70.

The plaintiffs, as well as the manufacturing company, excepted to this judgment, and upon the court overruling their motions for new trial both appealed.

The action of the trial court, in entering a judgment, which was not in conformity with the verdict of the jury, was unwarranted.

When a verdict finds the facts responsive to the issues, and on which a judgment can be entered, the functions of

the jury cease, and it is the duty of the court to enter judgment in conformity with the verdict. The verdict is conclusive on the court until set aside. *Cochran* v. *Moore*, 10 Mo. 417, 418; *Moore* v. *Winter*, 27 Mo. 380.

We are requested by plaintiffs appellants, to do now what the trial court should have done, and enter a judgment in conformity with the verdict of the jury. This we could not do, even if satisfied that the verdict of the jury was supported by the testimony, because the functions of this court and of the trial court are essentially different. This court can enter judgments only upon unquestioned facts, in exercising its appellate jurisdiction in common-law or statutory causes, and can vacate the judgments in such causes for legal errors only. All questions which affect the validity of verdicts, as dependent on the weight of testimony must be addressed to the trial court. The trial court in disregarding the verdict of the jury, although its action was informal and unwarranted by precedent, has in effect declared, that the verdict was not supported by the weight of evidence, under the instructions of the court. The plaintiffs were satisfied with the verdict and moved for judgment upon it, the manufacturing company defendant, moved to set the verdict aside. If we reverse the judgment and remand the cause for trial it will stand in the same position, as if the defendants' motion to vacate the verdict, and for a new trial had been sustained.

The amount of the mill company's indebtedness to plaintiffs is conceded. The only question, therefore, which we ought to consider, is whether the plaintiffs are, under the pleadings and evidence, debarred from any right of lien. If so they can get no more by remanding the cause, than what we can give them, a general judgment against the mill company, and our remanding the cause would subserve no useful end.

On that branch of the cause, the defendant appellant, claims that under the mechanic's lien law of the state, the

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plaintiffs are entitled to no lien, because the machinery and materials were furnished by them at a time when the property of the mill company, sought to be charged with the lien, was subject to the prior lien of the deed of trust, which has since been foreclosed by sale. That such deeds of trust covered not only the machinery in the mill at the date of its execution, but also by its terms all that "may hereafter be on said premises and said building or elsewhere as the property of said Mullanphy Planing Mill Company."

Our statute concerning mechanics' liens gives no lien on machinery furnished, but gives a lien for machinery furnished on the building of which it has become a part. *Collins* v. *Mott*, 45 Mo. 102. This lien, as far as the building is concerned, is entitled to preference over a mortgage which was on the premises prior to the time when the machinery was furnished (Rev. Stats. 1879, sect. 3174), only to the extent, however, to which the machinery thus furnished enters into the completion of an uncompleted structure. As against the prior mortgagee the material-man or contractor is not entitled to any lien for repairs. *Haeussler* v. *Thomas*, 4 Mo. App. 467.

In this cause there was evidence tending to show that part at least of the machinery furnished by plaintiffs was furnished for completing the mill, and became attached thereto as part thereof, and it was proper for the court to take the opinion of the jury as to what part was so furnished, because to the extent of the part so furnished the plaintiffs were entitled to a lien against the mill building. It was in his endeavor to separate the items which became part of the building, from those that did not, that the judge of the trial court fell into the error of rendering a judgment, warranted perhaps by the evidence and the law, but unwarranted by the verdict of the jury.

Nor can the manufacturing company claim any greater rights than it otherwise would have, owing to the clause in

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the deed of trust covering after-acquired property. A mortgage on after-acquired property operates only by way of equitable estoppel, and is effectual only against the mortgageor and his privies in contract. It can attach to such property only in the condition in which it comes into the morgageor's possession. Jones on Mortg., sect. 158; *Fosdick* v. *Schall*, 99 U. S. 251; *Myer* v. *Car Co.*, 102 U. S. 10. The lien of a mechanic is a creature of the statute, and can not be conferred by contract, nor taken away by contract between third parties. If plaintiffs are entitled to any lien at all they are entitled to it on the ground that their lien attached to the building when they furnished the machinery, and that the property came into possession of the mill company charged with their right of lien.

Not being prepared to say that the plaintiffs under the evidence are not entitled to a lien as a matter of law, we must remand the cause for further proceedings. Costs of appeals to abide final results.

Judgment reversed and cause remanded. All the judges concur.

J. LANDESMAN ET AL., Respondents, *v.* W. H. GUMERSELL ET AL., Appellants.

February 24, 1885.

1. VENDOR AND VENDEE — DUTIES OF VENDEE WHEN MORE GOODS ARE SENT THAN ARE ORDERED. — The purchaser of goods to whom the seller sends more goods than are ordered is under no legal obligation to receive any part of the goods, nor to return them at his own expense.

2. VOLUNTARY BAILMENTS — MISFEASANCE — MEASURE OF DAMAGES. — If the purchaser voluntarily attempts to return the goods and by his mistake they are delayed on the road, he is liable only for the loss necessarily occasioned by the negligent execution of the voluntary bailment.

APPEAL from the St. Louis Circuit Court, THAYER, J. *Reversed and remanded.*

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G. M. STEWART, for the appellants: The defendants were not legally obligated to accept any of the goods which are sued for, inasmuch as more were sent and charged to them than they had purchased.—*Levy* v. v. *Green*, L. J. 28, Exch. 319; *Rommel* v. *Wingate*, 103 Mass. 327–330; Benj. on Sales (1883, Am. Note), sect. 531 *et seq.*, and cases cited sect. 978 and sect. 1030. And were not required to return the goods.—*Barton* v. *Kane*, 17 Wis. 38–45; *Larkin* v. *Mitchell*, 42 Mich. 296; *Grimoldby* v. *Wells*, 10 C. P. L. R. 391. The defendants are not liable because there has been no demand and refusal to redeliver the goods.—Story on Bail. (8th ed.), sect. 107; *Polk v. Allen*, 19 Mo. 467; *Ross* v. *Clark*, 27 Mo. 549; *State* v. *Mooney*, 65 Mo. 494.

LOUIS R. TATUM, for the respondents: When goods are sold and delivered under some condition precedent, as the payment of the purchase-money, the buyer does not acquire at once the property in the goods, but instead, holds them until paid for as bailee.—Schuler on Bail. 3; 2 Benj. on Sales, ch. 3.; *Bishop* v. *Chillito*, 2 B. & Ald. 329; *King* v. *Bates*, 57 N. H. 446; *Dunlap* v. *Gleason*, 16 Mich. 158; *Harrington* v. *King*, 121 Mass. 269. The purchaser of a chattel can not rescind the sale without returning it to the vendor.—*Perley* v. *Balch*, 23 Pick. 283; *Tisdale* v. *Buckmore*, 33 Me. 461; *Dill* v. *O'Ferrell*, 45 Ind. 268. A gratuitous bailee of money for the purpose of transmitting it to the owner, must perform the undertaking in good faith and with due diligence and attention, adequate to the trust reposed in him; and this question of diligence is one of fact for the jury.—*Eddy* v. *Livingston*, 35 Mo. 487; *Defour* v. *Mepbain*, 31 Mo. 577; *Huxley* v. *Hartzell*, 44 Mo. 370; 2 Kent Com. 569.

ROMBAUER, J., delivered the opinion of the court.

When the seller in filling an order sends more goods than

the buyer has ordered, the buyer is under no legal obligation to accept any part of the goods. *Rommell* v. *Wingate*, 103 Mass. 327–330; *Levy* v. *Green*, L. J. 28, Ex. Ch. 319; *Downer* v. *Thompson*, 2 Hill, 137. This seems to be the settled law, and was recognized as such by the trial court in this cause in its instruction to the jury. But we are referred to no cases which hold, that under such circumstances it is the duty of the buyer to return the goods to the seller, if by return, a redelivery of the goods to the seller, wherever he may be found is meant. The current of authority is to the contrary. *Lucy* v. *Monplet*, 5 Hurl. & N. 233; *Grimoldby* v. *Wells*, L. R. 10 C. P. 39. In the latter case Lord Coleridge, pointedly, says: "Why should he" (the seller) "be entitled to impose upon the purchaser, who never bargained for such goods, and who has a right to reject them, the burden of sending them back, possibly for a considerable distance and at a considerable expense. No authority, as it seems to me, can be cited for such a proposition, and the reason and justice are against it."

In the case now before us goods in excess of those ordered were sent by the plaintiffs — sellers — from Cleveland, Ohio, to the defendants, buyers, in St. Louis, Missouri. There was evidence tending to show that the defendants refused to accept the goods, and immediately notified plaintiffs to that effect. That the defendants might have stopped there, stored the goods as bailees for plaintiff, and could have successfully defended a suit for their value or contract price, seems to be conceded. *Culiffe* v. *Harrison*, 7 Exch. 901; *Levy* v. *Green*, *supra; Rommel* v. *Wingate*, *supra*. They, however, went further and attempted to return the goods, and by mistake first sent them to New York by express, and upon becoming aware of their mistake, after a lapse of several months, ordered them to be forwarded by express from New York to Cleveland, Ohio, to plaintiffs. The goods were tendered

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to plaintiffs in Cleveland by the express company, but plaintiffs refused to receive them, basing their refusal on the lapse of time between shipment and return, and on the further fact that the express company, as a condition precedent to the delivery of the goods, demanded of them the express charges thereon from St. Louis to New York, and New York to Cleveland.

This being the testimony the court erred in instructing the jury—

1. The court instructs the jury that it was the duty of defendants to have returned to plaintiffs the goods sued for in this action, in a reasonable time, and by the ordinary route from St. Louis to Cleveland, Ohio; and if the jury believe from the evidence that defendants did not return said goods to plaintiffs within a reasonable time and by the ordinary route, they will find for plaintiffs the full value of said goods, with interest from the time demand was made for payment to the present time, at six per cent per annum.

No such duty devolved on defendants under the facts proved, nor did the value of the goods and interest constitute plaintiff's measure of damages.

The evidence left the defendants in the position of mandatories, who at worst were guilty of misfeasance in executing a voluntary bailment. They could not be held for the value of the goods as buyers, because the evidence was clear that they had never accepted them. Nor could they be held for the value of the goods, as tortfeasors upon the theory of conversion, because neither an actual conversion, nor a total loss of the goods by their negligence was shown. *Ross* v. *Clark*, 27 Mo. 550.

The plaintiff's damages, if they are entitled to recover under the testimony, are to be measured by the amount which they necessarily lost by defendant's negligent execution of a voluntary bailment.

Judgment reversed and cause remanded. All the judges concur.

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CHARLES A. CLARK ET AL., Respondents, v. FAMOUS SHOE AND CLOTHING COMPANY, Appellant. 16 463 / 38 276 / 16 463 / 61 386

February 24, 1885.

1. NEGLIGENCE — CONTRIBUTORY. — A mother who falls into an open hatchway in the sidewalk while endeavoring to prevent her infant child, who had stumbled, from falling into it, is not, as matter of law, guilty of contributory negligence; although it appears that the hatchway was guarded, so as to prevent a person exercising reasonable care, from falling into it.

2. —— INSTRUCTIONS. — In such a case, it is not error to refuse an instruction for a non-suit offered on the ground that there was testimony that the hatchway had been opened by a trespasser.

3. JURORS — MISCONDUCT OF — EVIDENCE. — Misconduct of a juror can not be established by his own testimony, for the purpose of impeaching a verdict, whether it is alleged to have occurred in or out of the jury room.

APPEAL from the St. Louis Circuit Court, BARCLAY, J. *Affirmed.*

H. D. LAUGHLIN and A. BINSWANGER for the appellant: The burden of showing negligence is on the plaintiff. — *Curran* v. *Warner*, 36 N. Y. 153; Sher. & Redf. on Neg., sect. 12, p. 14; 2 Thompson on Neg. 1175. When the negligence of the plaintiff is disclosed by his own testimony he can not recover. — *Henry* v. *Railroad Co.*, 76 Mo. 288; *Nolan* v. *Shickle*, 69 Mo. 340, affirming 3 Mo. App. 300; *O'Donnell* v. *Railroad Mo.*, 7 Mo. App. 190. This law imposed no obligation on the defendant to station a watchman at the door to prevent its being opened. — *Harrison* v. *Collins*, 86 Pa. St. 153. The misconduct of a juror in this case was ground for a new trial. — *Bowen* v. *Washington*, 62 Mo. 302.

ROWE & MORRIS, for the respondent: It is well established that a juror can not, by affidavit or otherwise (personally), be heard to accuse himself of misconduct or otherwise to impeach his verdict. — *The State* v. *Diekman*, 11 Mo. App. 545; *The State* v. *Branstetter*, 65 Mo. 149; *The State* v. *Alexander*, 66 Mo. 148 The burden of show-

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ing contributory negligence is on the defendant. — *Clifford* v. *Dam*, 81 N. Y. 52; *Irvine* v. *Wood*, 51 N. Y. 224; *Hanlon* v. *Keokuk*, 7 Iowa, 488; *Buschong* v. *Gas-Light Co.*, 73 Mo. 220. Though the plaintiff was guilty of some negligence, which remotely contributed to the injury, yet, if the defendant, by the exercise of ordinary care and prudence, could have prevented it, he is liable. — *Burnham* v. *St. Louis and Iron Mountain Railway Co.*, 56 Mo. 338; *Walsh* v. *M. T. Co.*, 52 Mo. 484; *Smith* v. *Union Railroad Co.*, 61 Mo. 588.

Rombauer, J., delivered the opinion of the court.

A careful examination of the record in this cause discloses no errors which would justify us in vacating the judgment rendered by the court below.

It is an action by husband and wife to recover damages for personal injuries received by the wife. There was testimony tending to show that the cause of the accident, resulting in the injury complained of, was defendant's negligence, in permitting a hatchway to remain open on one of the public sidewalks in the city, adjoining defendant's premises. The hatchway was properly constructed, and the plaintiff wife fell into it while endeavoring to protect one of her children, a girl four years old, who had slipped on the sidewalk, and had fallen in front of the open hatchway. The sidewalk was about thirteen feet wide, and half of its width was occupied by this opening. The testimony was undisputed that when both doors of the hatchway were open they rested at an obtuse angle, on fixed stands, obstructing the sidewalk for one-half of its width, so that it was next to impossible for any passer-by to fall into the hatchway, except from that part of the sidewalk immediately in front of it, between the opening and the curb of the street.

The jury found a verdict for the plaintiffs, and assessed their damages at $2,500. The injuries received were of

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a serious character, and probably permanent in their effect. The verdict was reduced by the plaintiffs, on suggestion of the trial court, by remittitur to $1,700, and judgment was rendered in their favor for the latter amount.

The errors complained of by defendant in this court are: The refusal of the court below to non-suit the plaintiffs at the close of plaintiffs' case, and at the close of the entire testimony, upon instructions asked by the defendant in the nature of demurrers to the evidence, as well as giving other erroneous instructions to the jury, at its own motion, and refusing those asked by the defendant. The defendant also claims that the court should have set aside the verdict, on account of the misconduct of one of the jurors.

The defendant claims that its demurrer to the evidence at the close of the plaintiffs' case should have been sustained, because it appeared by the plaintiffs' testimony that she was guilty of contributory negligence.

Under the rule prevailing in this state it is not necessary for the plaintiff in actions of this character either to aver or prove that he was not guilty of negligence. *Thompson* v. *Railroad Co.*, 51 Mo. 192; *Loyd* v. *Railroad Co.*, 53 Mo. 512. But if the fact clearly appears by testimony offered on plaintiff's behalf that he was guilty of negligence, which directly contributed to the accident complained of, he can not recover, and the court should so instruct the jury. *Nolan* v. *Shickle*, 69 Mo. 340, and cases cited. The statement of this rule is very simple, but its application to particular facts is often very difficult. "There is no absolute rule as to negligence to cover all cases, that which is negligence in one case will become by change of circumstances ordinary care in another case, and gross negligence in a third," says Judge Wagner, in *Brown* v. *Railroad Co.* (50 Mo. 467). If plaintiff, walking along this sidewalk alone, had by inadvertence fallen in to this opening, it might, perhaps, have been conclusive proof of negligence on her part. Yet who can justly say, that because in her

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anxiety for her little child, who was or whom she deemed to be in immediate danger, she went one step too far, or slipped, or disregarded those precautions which under other circumstances she might or ought to have taken, she was guilty of such negligence as to debar her of all redress.

In *Loyd* v. *Railroad Company* (*supra*), where the same point was made under similar circumstances, Judge Napton, in overruling the point, said: "Whilst it may be law that a passenger who jumps from a train when in motion, takes the risk of injury to life and limb, it does not follow that the plaintiff in this case could be expected, while standing on the steps of the car, and after her child, three years old, had been lifted out, to have the presence of mind to deliberate on the propriety of following the child, although the train immediately commenced to move, nor had she time to reflect on the danger of a straight forward movement at right angles with the train instead of inclining in the direction the train was moving."

It must be evident therefore that the court committed no error in refusing to instruct the jury at the close of the plaintiffs' case, that the plaintiffs could not recover. *Hoyt* v. *City of Hudson*, 41 Wis. 105. Thompson on Neg., p. 1178, sects. 24, 25. Nor was it error on part of the court to refuse a similar instruction, at the close of the entire testimony. That instruction was claimed by the defendant on the theory, that evidence produced by it established the fact that the hatchway was left open by a trespasser, and not by one of defendant's employees. Regardless of the question as to whether that fact if established would have been sufficient of itself to exonerate the defendant, on which question we desire to express no opinion, it is sufficient to say, that the court submitted the testimony on that point to the jury, and that the jury by their verdict have negatived the existence of the fact.

Nor can the defendant justly complain of the charge of the court to the jury. All elements of its defence were

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placed fully and fairly before the triers of the fact by instructions given by the court of its own motion, some of them even more pointedly than we could have justified if the plaintiffs were the complainants in this court. The case of *Busching* v. *Gas-Light Company* (73 Mo. 219), cited by defendant furnishes, on that head, a complete refutation of the justice of the defendant's complaint.

We have also examined the defendant's complaint founded on the alleged misconduct of a juror. That misconduct consisted, as the record shows, of the juror going to the building where the accident occurred, after the trial began, inspecting it and making some measurements, for the purpose, as he says, of verifying the correctness of the plats offered in evidence, and of seeing whether the place was dangerous. The general rule undoubtedly is that the triers of the fact should derive their information from the evidence offered on the trial of the cause and the law as given to them by the court. They are sworn to do so and are guilty of misconduct if they violate their oaths in that regard. If the misconduct of the juror in this case would have been substantiated by anything beyond his own testimony, we would have felt at liberty to consider it, and determine whether it was such as to deprive the plaintiffs who were wholly innocent, of the benefit of their verdict. But the only evidence found in the record of the alleged misconduct of the juror, is his own testimony given in court upon the hearing of the motion for new trial. This testimony we are not at liberty to consider, nor should the trial court have considered it, because under the rule now prevailing in this state, the testimony of a juror tending to impeach his verdict, can not be received, and it seems to make no difference in that regard, whether the alleged misconduct took place in or out of the jury-room. *The State* v. *Alexander*, 66 Mo. 148. *The State* v. *Branstetter*, 65 Mo. 156; *The State* v. *Fox* 79 Mo. 112.

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From the foregoing it is apparent, that the trial court committed no error in the trial of this cause, and that its judgment must be affirmed. It is so ordered. All the judges concur.

STATE OF MISSOURI EX REL. EVANGELICAL LUTHERAN CEMETERY ASSSOCIATION, Appellant *v.* ROBERT LANGE, ASSESSOR, Respondent.

February 24, 1885.

1. TAXES — EXEMPTIONS — CONSTRUCTION OF GRANTS. — Grants of exemption from taxation must be strictly construed, and the grantee can take nothing by intendment or implication.
2. —— CEMETERIES. — A charter exemption of property from taxation "so long as the same shall remain dedicated to the purposes of a cemetery," can not be made to include a lot of ground which is rented out to a third person who uses it as a residence and for purposes of husbandry.

APPEAL from the St. Louis Circuit Court, THAYER, J. *Affirmed.*

W. B. THOMPSON, for the appellant: That a portion of the ground is used by the sexton of the cemetery association will not prevent an application thereto of the grant of exemption. — *The State ex rel.* v. *Powers*, 10 Mo. App. 263; *s. c.* 74 Mo. 476; *North, etc., Society* v. *Hudson*, 12 Mo. App. 342.

LEVERETT BELL, for the respondent: The ground is not used for cemetery purposes under a strict construction of the grant. — *The People* v. *Cemetery*, 86 Ill. 336; *Mulroy* v. *Churchman*, 52 Iowa, 238.

ROMBAUER, J., delivered the opinion of the court.

Among the sovereign powers of the modern state, the power of taxation is the most essential. Using the words

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of Chief Justice Marshall, we may say that "as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear." *Provident Bank* v. *Billings*, 4 Pet. 561, 562. It necessarily follows from this, that all grants made by the state, be it to individuals or corporations, exempting them or their property from taxation must be construed, though reasonably, yet with the greatest strictness against the grant. Indeed, while courts may sometimes have failed in the correct application of the principle, they have never hesitated to assert it as fundamental, that in grants of this character the grantee can take nothing by intendment or implication, which lies beyond either the letter or spirit of the grant, that courts are not justified to refine for the purpose of resolving any latent doubt in favor of the grantee, but should decide, that if any doubt exists as to the terms or extent of the grant, the benefit of that doubt belongs to the people.

Starting from these premises and applying these unquestioned propositions to the facts of the case before us, we must reach the conclusion that the court below committed no error in denying to the relator a peremptory writ.

This is a proceeding by *mandamus* to compel defendant who is assessor of the city of St. Louis to cancel his official assessment of a lot of ground, because such lot is exempt from taxation by the terms of relator's charter.

The relator is a cemetery association, and is authorized by its charter to acquire and hold a tract or tracts of land not exceeding forty acres to be appropriated and used for a cemetery or burial ground. Its charter further provides that no sale of lots in said cemetery, or in any additional tract of land, purchased for the purpose aforesaid, shall be made, until at least one-fourth of said cemetery, or any tract of land appropriated by the corporation for the pur-

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pose aforesaid shall be laid off in suitable lots, etc. The last section of the charter, under which the exemption is claimed, is in the following words: "Said cemetery is hereby declared exempt from all taxes and assessments so long as the same shall remain dedicated to the purposes of a cemetery." It must be evident from the terms of the charter herein set out, that the exemption claimed does not attach to the lands, simply because they are owned by the relator, nor does it attach to lands which the corporation may have purchased with a view of making a cemetery thereon. If such would have been the intention of the legislature it would have in express terms exempted all lands owned by the corporation, because the power of the corporation to hold lands is limited to forty acres, and the purpose for which it may acquire them, is limited to cemetery purposes. On the contrary, the charter in express terms draws a distion between the cemetery, which is exempt, and other tracts, which the corporation may acquire for cemetery purposes.

The corporation own two tracts of land divided and separated by a public highway, one consisting of lot 14, in James B. Clay's subdivision, and the other of lots 139, 140, 141, 142, and 143 of North Cote Brilliante subdivision, having acquired both tracts in 1867, about two years after its incorporation. Both tracts together do not exceed forty acres.

On the larger of these two tracts, it has laid out a cemetery, and has subdivided part of it into lots which it has sold for purposes of interment. This tract never was assessed for taxation, it being conceded that it is exempt under the terms of relator's charter. The smaller tract the corporation rents out to its sexton, who occupies it as a residence, and uses it for market and ornamental gardening, and who pays to the corporation for such use an annual rent of one hundred and fifty dollars. This smaller tract has been thus used ever since the corporation ac-

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quired it, and such use as far as the evidence shows may be continued for all time. It is this smaller tract which relator claims is also exempt from taxation on the ground that it is used for cemetery purposes. This use relator is endeavoring to establish by testimony tending to show that the money paid by the sexton is not by way of rent, but by way of a bonus for holding the position of sexton; that while the sexton raises vegetables on the land, and cultivates about one-half thereof for that purpose, which vegetables he sells in the open market, he also raises flowers and ornamental shrubs, which he sells to owners of lots in the cemetery across the way for the decoration of graves, and that many years ago some trees were planted on this lot with a view of using it as a cemetery at some future time. Also testimony tending to show that water from the well at the sexton's house is used by him for watering the graves on the other tract, for which service presumably he is likewise paid by owners of the lots, though the evidence is silent on that subject.

It will be seen from the foregoing that we could arrive at the conclusion that this smaller lot is also a cemetery, only by artificial reasoning, and that we would have to refine to a considerable extent to bring it within the terms of the exemption granted. This under the rules of construction applicable to such grants we are precluded from doing.

We do not decide that the corporation has forfeited its right to hold this smaller tract exempt from taxation, we simply hold that the exemption never attached thereto, because whatever the purposes were for which it may have acquired it, it has never been and it is not now a cemetery. Nor do we place any particular stress on the fact that this tract is divided from the cemetery by a public road, except in so far as the highway makes a fixed and defined boundary. Our conclusion would be the same if the dividing line consisted of a fence, or of a furrow drawn across the ground,

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provided the two tracts by any fixed line of demarkation were separated from each other, the one being used for the purposes of husbandry, and the other for the purposes of interment.

We are fortified in our conclusion by a carefully decided case, covering almost the identical ground. In *The People* v. *The Cemetery Company* (86 Ill. 336), the exemption claimed rested on much broader ground. The charter exemption there covered not only all lands held by the corporation for burial purposes, but also those "*subservient to burial uses.*" The lands claimed as exempt there were platted and recorded as cemetery grounds, and the corporation had erected on them several buildings occupied by men in its employment, and stables wherein its horses were kept, and as occasion would require the sand and mould was taken from such tract and used for the improvement of the other tract of the company which was in actual use as a cemetery. The two tracts were also only separated by a highway. It was claimed by the company that the term "*subservient to burial uses*" brought the land within the exemption, but the claim was denied by the court. See also *St. Mary's College* v. *Crowl*, 10 Kas. 442.

We are referred to nothing by relator militating against the position which we have herein taken. We are referred to the case of *The State ex rel.* v. *Powers* (10 Mo. App. 264), affirmed by a divided court above (74 Mo. 476) as opposed to the judgment rendered herein by the trial court. Whilst the result reached in that case is not in conflict with the judgement rendered by the trial court in this case, or with this opinion, yet we are free to say that some things were said in the hospital case, by the learned judge who delivered therein the opinion of this court, which do not meet with our unconditional approval.

The judgment of the court denying the peremptory writ is affirmed, all the judges concurring.

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Separate opinion by THOMPSON, J.

I concur generally in the course of reasoning in the foregoing opinion, but I do not think it necessary to say that exemptions from taxation will be construed "with the greatest strictness." Like all other public grants of special privileges in derogation of common right, they are to be strictly construed, which means that nothing is to be taken by implication unless the implication flows necessarily from the terms of the grant. Nor does the opinion of this court in *The State ex rel.* v. *Powers* (10 Mo. App. 263), contain anything which does not meet my unconditional approval. That decision proceeded on the ground that the hospital of the Alexian Brothers was established and carried on purely for charity, and that the mere circumstance that the brothers accepted money from patients who were able to pay, which money they applied to the care, nursing and sustenance of those who were not able to pay, did not make the purposes of their hospital any the less "purely charitable," within the meaning of the constitutional provision. I do not think that that circumstance made the purposes of their hospital any the less purely charitable, than the fact that a church fair intended to raise money for the support of the church is occasionally held in the church edifice, should operate to subject the edifice to taxation.

STERN AUCTION AND COMMISSION COMPANY, Appellant, *v.* ISAAC M. MASON, Respondent.

February 24, 1885.

1. **REPLEVIN — PLEADING AND PRACTICE — EVIDENCE.** — In an action of replevin any fact which tends directly to disprove right of possession in the plaintiff may be shown under a general denial.

2. —— **FRAUDULENT CONVEYANCES.** — In such an action, fraud in the acquisition of the plaintiff's title may be proved by the defendant under the general denial.

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3. —— INADEQUACY OF PRICE — PRACTICE — In cases of conveyances affecting creditors, inadequacy of price coupled with circumstances of secrecy and concealment is sufficient to take the case to the jury.

4. EVIDENCE — PRACTICE. — The introduction of improper evidence which can not, under the circumstances of the case, prejudice the appellant, is not ground for a reversal.

5. NOTICE. — He who has knowledge of facts sufficient to put him upon inquiry, is chargeable with notice of the facts which inquiry would have disclosed.

APPEAL from the St. Louis Circuit Court, LUBKE, J.

Affirmed.

KRUM & JONAS, for the appellant: Under a general denial evidence of fraud in the acquisition of the plaintiff's title is inadmissible. — *Frisbee* v. *Langworth*, 11 Wis. 375; *Glazer* v. *Clift*, 10 Cal. 303; *Hoxell* v. *White*, 1 Moo. & R. 400; *Gray* v. *Earle*, 13 Iowa, 188; *Demick* v. *Chapman*, 11 Johns. 132; *Ely* v. *Ehle*, 3 Comst. 511; Bliss C. Pl., sect. 329; *Northrup* v. *Insurance Co.*, 48 Mo. 444.

DYER, LEE & ELLIS, for the respondent: Under a general denial in replevin evidénce that the plaintiff acquired his pretended title by fraud is admissible. — *Young* v. *Glasscock*, 79 Mo. 574; *Greenway* v. *James*, 34 Mo. 328; *Bosse* v. *Thomas*, 3 Mo. App. 472.

ROMBAUER, J., delivered the opinion of the court.

The defendant, as sheriff of the city of St. Louis, and under a writ of attachment issued at the instance of one Van Ingen against one Greene, took the property in controversy out of the plaintiff's possession. The plaintiff thereupon brought this action and took the property out of the defendant's possession by writ of replevin.

The plaintiff's petition is in the form usual in such actions, and states the value of the property at $2,000. The defendant's answer is a general denial, with an assertion of claim and a prayer for the return of the property.

The following facts are conceded by the testimony:—

First. That Greene, was a merchant tailor and sold and

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delivered his entire stock of merchandise for the sum of $2,000 to the plaintiff, who was the proprietor of an auction house.

Second. That Greene, at the time of such sale, was in embarrassed circumstances and largely indebted to Van Ingen and others for the merchandise thus sold.

On the trial in the court below the jury found in favor of the defendant, and the plaintiff being in possession of the property, assessed the value thereof at $3,420, and the court thereupon rendered judgment in favor of the defendant against the plaintiff and its sureties, for the return of the property, or its assessed value, at the defendant's election.

The appeal is prosecuted by plaintiff from this judgment, and the errors complained of by it in this court are: —

First. That the court erred in admitting evidence bearing on the question of fraud in the sale of the property from Greene to the plaintiff, because such evidence was inadmissible under the pleadings.

Second. That the court erred in admitting evidence bearing on the question of Greene's intent to hinder or delay a particular class of creditors.

Third. That the court erred in refusing to instruct the jury on the plaintiff's request that there was no evidence that in making the sale of goods to the plaintiff Greene intended to hinder, delay, or defraud his creditors.

We shall examine these objections in detail, in order to determine whether any of them are well founded.

There is no merit in the plaintiff's first objection. It has been repeatedly held in such actions, that anything that tends to controvert directly ownership and right of possession in the plaintiff may be shown under a general denial. *Shulenburg* v. *Harriman*, 2 Wall. 58, 59; *Caldwell* v. *Bruggemann*, 4 Wis. 276. Moreover we find the objection definitely disposed of by the ruling of the court in *Young* v.

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Glascock (79 Mo. 575, 577), which was in most respects identical with the case at bar, and where the court in overruling the same objection holds, that any proof on part of the defendant, which goes to show that the plaintiff at the time of the institution of the suit was not the actual owner, and was not entitled to the possession of the property, is admissible under the general issue, *even though it extend to the proof of fraud in the acquisition of the plaintiff's title.*

The second complaint of the plaintiff is based on this fact. In the course of the examination of Greene, the defendant in the attachment, who was examined on behalf of the defendant, he stated that his purpose and object in making the sale was to pay people from whom he had borrowed money. Thereupon the following question was put to him by the defendant's counsel:—

"*What with reference to creditors for merchandise?*" Counsel for the plaintiff objected to the testimony as incompetent, but the court overruled the objection, stating that what the purpose and intent of the vendor was is a question for the jury. The witness then answered the question as follows: "*My purpose was to pay out as much as I got, and pay the rest as soon as I could get on my feet to pay it.*" Now, disregarding the fact, that the objection, if tenable at all, was not put on the proper ground, and conceding for the sake of argument the further fact that inquiry into the vendor's purpose and intent in regard to a particular class of creditors is irrelevant, it is not apparent how the answer of the witness, which does not tend to show any purpose or intent on his part to hinder or delay by the sale any of his creditors, could have prejudiced the plaintiff. As the sale covered the entire stock of the vendor, the effect of the sale, on other creditors except such as he saw fit to pay out of the proceeds, was self-evident, and his answer does not even emphasize this effect. But beyond this the court at the instance of the plaintiff

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instructed the jury that the mere fact that the sale had this operation, was not of itself sufficient to avoid it, and that Greene had the lawful right, although insolvent, to sell his goods to the plaintiff, or to any one else, provided he did so with an honest purpose.

We are of opinion therefore that there is no merit in the plaintiff's second objection.

The plaintiff's third objection rests on the ground that there was no evidence in the case which justified the court to submit the question of fraud in the sale by Greene to the plaintiff to the jury. That the court erred in refusing the plaintiff's instruction stating that there was no such evidence, and further erred by giving the defendant's instructions based upon hypothetical facts, from which the jury might find such fraud.

The testimony tended to show the following facts: The market value of the goods, even disconnected from the vendor's business, was according to the vendor's testimony about $3,800 to $4,000. The actual price which the plaintiff paid for them was $2,000. The inadequacy of the price paid was therefore virtually conceded by the testimony.

It was held in *Robinson* v. *Robards* (15 Mo. 459), that in all cases of conveyances affecting creditors the inadequacy of price is a circumstance of great weight against the validity of the sale. In *Curd* v. *Lackland* (49 Mo. 454) approved in *Ames* v. *Gilmore* (59 Mo. 549), it was held that gross inadequacy of price is one of the badges of fraud, and becomes controlling when coupled with other circumstances tending to show fraud. The inadequacy of price in the sale from Greene to plaintiff was sufficient to take the case to the jury on the question of fraud, coupled, as it was, with circumstances of secrecy and concealment in the consummation of the transaction. *Ross* v. *Crutsinger*, 7 Mo. 249.

There was also testimony tending to show that one Alof,

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the agent of Van Ingen, was at Greene's store when Stern, plaintiff's agent, came there to examine the goods, with a view of closing the purchase. That this examination only lasted a few minutes. That Greene made some remarks to Stern, with a view of misleading Alof as to the object of Stern's presence, and then told Stern that Alof was one of the parties from whom he (Greene) had bought the goods, and that he wanted to get him out of the store. That he subsequently did get Alof out of the store, and no sooner was he out of the store, than the removal of the goods to plaintiff's auction house began. That removal was almost wholly completed the same afternoon.

The solicitude of the vendor to conceal the transaction from one of his creditors, and the anxiety on his part to remove the agent of the creditor from the store before any part of the goods were moved, being communicated to the purchaser, were facts sufficient to put such purchaser upon inquiry. If the facts were sufficient to put him upon inquiry, and he failed to make it he is chargeable with notice. *Rupe* v. *Alkire*, 77 Mo. 643. We believe, therefore, that there is no merit in plaintiff's third objection, and as the case was put to the jury on instructions otherwise unobjectionable, the judgment of the trial court should be affirmed. The other judges concurring it is affirmed.

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STATE OF MISSOURI TO USE OF C. S. HAYDEN ET AL., Respondent, *v.* PATRICK MCHALE ET AL., Appellants.

February 24, 1885.

1. ATTACHMENT — ACTION ON BOND — PRACTICE — FORM OF VERDICT. —In an action on an attachment bond, where several items of damage are alleged, the jury in their verdict properly specify the damages under each allegation.

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2. —— A refusal to receive such a verdict is not ground for a reversal, where the jury immediately return a verdict for the aggregate amount of their first findings.

3. —— ATTACHMENT BONDS ASSIGNABLE — SET-OFF. — The assignee of an attachment bond may sue thereon in his own name, but the defendant may have the benefit of any off-set he would have had against the assignor.

4. —— PLEADINGS — DAMAGES ON BOND — ATTORNEY'S FEES — EXPENSES.— In an action on an attachment bond allegations that the plaintiff "was required to pay out large sums of money in the defence of the suit, and suffered a loss of time in attending thereto, and was deprived of the use of the money attached, and was injured in his business," etc., are sufficient to warrant a recovery for attorney's fees and extra expenditures in the suit.

5. —— PRACTICE — MOTIONS. — Where the defendant claims that allegations of special damage in such an action, are not sufficiently explicit to advise him of the elements of damage, he should move to have the petition made more definite and certain.

6. —— PLEA IN ABATEMENT — ATTORNEY'S FEES. — In such an action, where the attachment was dissolved on the hearing of the plea in abatement, the plaintiff can recover only for such counsel fees as are incurred in sustaining the plea in abatement.

7. —— In such an action, where the attachment is not dissolved until final judgment on the merits, the judgment on the plea in abatement being for the plaintiff, a reasonable fee for attorney's services on the trial of the merits may be recovered.

8. —— EXPENSES. — Cash paid out for the examination of books and for a transcript of the record, if the expense therefor was necessarily incurred in the preparation of the defence, is recoverable in such an action.

9. —— A stenographer's services are not, as matter of law, a necessary expense of a trial, and in such an action there can be no recovery for such services unless they are shown by the evidence to have been necessary.

10. —— INTEREST. — In such an action, interest on the money attached, by garnishment, may be recovered by way of damages.

11. —— EXCESSIVE VERDICT — REMITTITUR — APPELLATE COURTS. — In such an action, the appellate court may, where the damage is excessive, reverse the judgment for that cause, unless the respondent will, by stipulation, remit the amount of the excess.

APPEAL from the St. Louis Circuit Court, HORNER, J. *Reversed nisi.*

W. H. CLOPTON, for the appellants: An attachment bond is not assignable. — Rev. Stats., sects. 408, 409.

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The only person who can maintain an action on the bond is the defendant in the suit in which the bond was given.—*Davis* v. *The Commonwealth*, 13 Gratt. 138; *Rospelin* v. *Browndon*, 7 La. 231; *Edwards* v. *Turner*, 6 Rob. (La.) 382. The declaration fails to aver the non-payment of the damages sustained by the principal in the bond, and is therefore bad.—*Michael* v. *Thomas*, 27 Ind. 501; *Urig* v. *Snex*, 32 Ind. 493; *Ryder* v. *Thomas*, 32 Iowa, 56; *Horner* v. *H.*, 37 Iowa, 378; *Prindy* v. *H.*, 1 Mont. 367; Drake on Attach., sect. 168. The petition does not state a cause of action as to attorney's fees.—*The State* v. *Blakeman*, 51 Mo. 320. Attorney's fees for the trial on the merits can not be allowed.—*Roe* v. *Thompson*, 19 Mo. 613; *Clifford* v. *Beldsmeier*, 56 Mo. 227; *Kelly* v. *Beauchamp*, 59 Mo. 178; *Cantwell* v. *Stark*, 75 Mo. 569; *Whyte* v. *Wiley*, 17 Ala. 167. There can be no recovery for attorney's fees unless the fees have been paid or contracted to be paid, and are proved to be reasonable.—*Schultz* v. *Morrison*, 3 Metc. (Ky.) 98; *Johnson* v. *Farmer's Bank*, 4 Bush, 282; *Doe* v. *Perkins*, 8 B. Mon. 198; *Lucas Bank* v. *King*, 73 Mo. 590.

W. B. THOMPSON, for the respondent: The judgment in this case is for the damages that the plaintiff's assignor sustained by reason of the attachment, including any damages directly occasioned by any process or proceeding in the suit.—*The State to use* v. *Thomas*, 19 Mo. 613; *The State to use* v. *Beldsmeier*, 56 Mo. 226; *The State ex rel.* v. *Stark*, 75 Mo. 556.

ROMBAUER, J., delivered the opinion of the court.

What kind of damages an obligee in an attachment bond, given in pursuance of the statute, is entitled to recover from the obligors in a suit upon the bond for breaches thereof, is a question of law. It follows from this, that where there is no controversy whatever as to the amount of

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the various items which are claimed as damages in such suit, the judgment stands upon unquestioned facts and is a mere conclusion of law.

In this cause, the suit being one upon an attachment bond, the plaintiffs, who are assignees of the bond, set out in their petition the giving of the bond, and its terms, which are statutory. They also set out the garnishment of several debtors of the defendant in the attachment, and the seizure of debts in their hands, and assign as a breach of the bond a final judgment in favor of defendant in the attachment upon the merits. Their petition made the following averment as to the damages sought to be recovered in this suit: —

"Plaintiffs further state that by reason of the attachment and garnishments and suit aforesaid, and in consequence of breaches of said bond, the said Gustus Oertel (the obligee in the bond) was required to pay out and expend large sums of money in the defence of said suit, and suffered a loss of time, in attending thereto, and was deprived of the use of the property so attached, and was injured in his business by reason of the levy and seizure of said sums of money under said attachment and sustained other damages and injuries, etc., amounting to $4,100.00."

There was a verdict for plaintiffs for $926.00 consisting, according to the statements of the jury in a verdict rejected by the court but preserved in the record, of the following items: attorney's fees, $368; Oertel's expense, $162; interest claimed, $396. Total, $926.00.

The court upon rejecting this verdict instructed the jury in writing to find a general verdict for a gross sum and they thereupon returned a verdict for plaintiffs for $926.00, and the court rendered judgment for the penalty of the bond $4,100, with award of execution for the amount found by the jury and costs.

For the reason first herein above stated we need not examine defendant's numerous objections to the evidence nor the

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instructions of the court given and refused. The judgment rendered must stand or fall according to the law applicable to the unquestioned testimony and the detailed finding of the jury. The defendants requested that the first and detailed verdict, brought in by the jury, be received and filed, and excepted to the action of the court in refusing to do so. But while the action of the court in refusing to receive that verdict was manifest error, we can not see how the defendants were prejudiced by it, since the second verdict is for the same amount, and the first verdict is preserved in the record so as to enable us to examine the findings of the jury in detail.

The substantial objections now made by defendants in this court are: —

1. That an attachment bond is not assignable and the assignees can not maintain an action thereon in their own name.

2. That the plaintiff's petition does not contain a sufficient averment of special damages so as to entitle them to recover counsel fees, extra outlays, and interest.

3. That the obligee in the bond can not recover counsel fees for trying the merits of the suit after judgment on the plea in abatement, nor expenses incident to the suit which could not be taxed as costs.

4. That the award of the jury on account of interest is excessive.

We have examined these objections and find: —

1. The first objection is not well taken, nor is it sustained by the cases cited by defendants. These cases simply hold that no one can sue on an attachment bond unless he is within its provisions. Moreover, this objection being simply that plaintiffs have no legal capacity to sue, has been waived, as the defect, if any appears upon the face of the repetition, and defendants have not demurred. There is no merit in defendant's claim, that by the fact that the suit is brought in the name of the assignee they have lost the

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benefit of a set-off which section 409 of the Revised Statutes gives to them. They could have asserted their set-off against the assignee, but their answer affirmatively shows that the pretended set-off of defendant McHale, consists of a claim on an unsettled partnership account, is unliquidated, and is not a proper subject of set-off under our statute. *Johnson* v. *Jones*, 16 Mo. 494; *Mahan* v. *Ross*, 18 Mo. 121.

2. The second objection is not well taken. An averment in a petition, of special damages claimed is necessary to prevent the defendant's being taken by surprise at the trial. The case of *The State* v. *Blackman* (51 Mo. 320), relied on by defendants goes no farther. The averments in this petition are sufficiently specific to admit evidence of every item of special damages claimed by plaintiffs on the trial, and are much fuller than the averments made in *Hayden* v. *Sample* (10 Mo. 217), and *Kelly* v. *Beauchamp* (59 Mo. 180), where the same objection was made and overruled. It was in defendants' power if they were not sufficiently advised of the details of plaintiff's claim to compel them by motion to make their petition more definite and certain.

3. The third objection, though well taken in part, is avoided in part by the peculiar facts of this case. It seems to be settled that attorney's fees and other expenses incident to a suit, which are recoverable as damages in a suit on the attachment bond, are confined to such as are incurred in obtaining a dissolution of the attachment. That is the rule in suits on injunction bonds. *Boatmantel* v. *Stewart* (55 Cal. 115); *Hovey* v. *Rubber Tip Co.* (12 Abb. Pr. (N. S.) 360, 372), and those are in that respect analagous to suits on attachment bonds. But in this case the judgment on the plea in abatement was in favor ofplaintiff in the attachment suit, the attachment was therefore not dissolved until defendant obtained a final judgment in his favor on the merits. The trial of the suit upon its merits thus became necessary to obtain a dissolution of the attachment. The

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testimony of experts as to the value of professional services in this case, not being testimony touching facts, but mere matter of opinion, was not conclusive. Yet, as the uncontradicted testimony placed the value of attorney's services at from $900 to $950, and the jury by their award fixed that value at $360 only, we are in a position to say that the award, on that particular account is not excessive and the defendants are not in a position to complain. The next allowance covered by this objection, "Oertel expense, $162," is composed of three items, and interest on their aggregate. The first of these items is $50 cash paid out for examination of books, and the last $5 paid for transcript of a record. The terms of the bond make the obligees responsible for all damages and costs that may accrue to defendant by reason of any process or proceeding in the suit. The uncontradicted testimony shows that these expenses were necessarily incurred in a proper preparation of the defense. If so they are clearly covered by the terms of the bond. This, however, can not be said of the third item which is $83, paid to a stenographer for his *per diem* and writing out testimony to prepare bill of exceptions. There is evidence in the record that the amount paid was reasonable, but no evidence that the expense was necessary. We can not, as a matter of law, decide that a stenographer's services are a necessary expense of a trial; facts and circumstances may make them so, but in that event those facts and circumstances must be shown. This allowance of $83, and interest was therefore unwarranted, an excess of $97.

4. The fourth objection, however, is unquestionably well taken. We will concede that the jury in the absence of positive proof to the contrary on the presumption that things shown to have existed are presumed to continue, were justified to find that defendant Oertel was the holder of the Heman note, when Heman was garnished as his debtor. We will further concede that as that note was payable without interest, he, in consequence of the garnish-

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ment, lost the interest, or the value of the use of the money which, in absence of other proof would be legal interest. Still that interest so lost for the entire period while the garnishment remained in force was only $276.16 and not $396, as stated by the jury in their verdict. There can be no pretence under the testimony that the defendant in the attachment lost any interest on account of the other garnishment.

To the extent of $216.84 the verdict is clearly excessive as a matter of law under the evidence and finding, and the judgment must be reversed unless the plaintiffs will within five days after the filing of this opinion remit such excess by stipulation filed in this court, and if they file such stipulation the judgment will be affirmed. All the judges concur.

ANTON HOESTER, Appellant, *v.* ERNST HEMSATH, Respondent. 16 485 98m511 16 485 58 177

February 24, 1885.

1. DAMAGES — ADJOINING PROPRIETORS — SURFACE WATER — COMMON-LAW RULES. — The rights of land owners with respect of the flow of surface water over their lands is governed by the rules of the common law.
2. —— A land owner may rightfully so ditch his own land as to collect, and cause to flow into a pond in a body, surface water which formerly flowed into the pond through natural channels.
3. —— EQUITY. — Where the evidence leads to the conclusion that an overflow of the pond is caused by detrition rather than by an increased flow of water, equity will not relieve the owner of the overflowed land.

APPEAL from the St. Charles Circuit Court, EDWARDS, J. *Affirmed.*

W. A. ALEXANDER and C. W. WILSON, for the appellant: No person has the right to protect himself from a stream or water-course by throwing it on the lands of another, or, on the ground of self-protection, to prevent the waters of floods and freshets from flowing where they are accustomed to flow. — *McCormick* v. *Railroad Co.*, 70 Mo. 359; *Shane* v. *Railway Co.*, 71 Mo. 237; *Munkries* v. *Railroad*

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Co., 72 Mo. 514; Ang. on W. C., sects. 108*j*, 108*k*; *Bruson* v. *Railroad Co.*, 78 Mo. 514.

C. DAUDT, for the respondent: The supreme court of the state, in a long line of decisions, have sustained the common-law doctrine, contended for by the respondent. — *Clarke, Admr.*, v. *Railroad Co.*, 36 Mo. 224; *Finley* v. *City of Springfield*, 55 Mo. 119; *Jones* v. *Hannovan*, 55 Mo. 462; *M'Cormick* v. *Railroad Co.*, 57 Mo. 437; *Hosher* v. *Railroad Co.*, 60 Mo. 329; *Minkers* v. *Railroad Co.*, 72 Mo. 514; *Benson* v. *Railroad Co.*, 78 Mo. 504; *Stewart* v. *City of Clinton*, 79 Mo. 603.

ROMBAUER, J., delivered the opinion of the court.

It has been for some years past a mooted question in this state, whether the rights of land owners, in regard to the flow of surface water over their land, including the control and diversion of such water to the injury of adjoining owners, should be determined by the rules of the common law or by the rules of the civil law.

This question must be considered to be set at rest by the exhaustive opinion, delivered by the supreme court at its present term in the case of *Abbott* v. *Kansas City, St. Joe and Council Bluff Railroad Co.* In that opinion the supreme court reviewing its former ruling unanimously declares that the common law of England, having been adopted by statute as the rule of action and decision in this state, any law, usage or custom to the contrary notwithstanding, must be the governing rule on this subject as on all others. It overrules the case of *McCormick* v. *Railroad Co.* (70 Mo. 359), and *Shane* v. *Railroad Co.* (71 Mo. 237), as far as the same are in conflict with that view, and adheres to, and reinstates the common-law doctrine, recognized heretofore as controlling on that subject by a long course of uniform decisions. *Clark* v. *Railroad Co.*, 36 Mo. 224; *Imler* v. *Springfield*, 55 Mo. 119; *Jones* v. *Hannovan*, 55 Mo. 462; *McCormick* v. *Railroad Co.*, 57 Mo. 437; *Hosher* v. *Rail-*

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road Co., 60 Mo. 329; *Munkers* v. *Railroad Co.*, 60 Mo. 334. Starting from the premises that the rights of the parties in this controversy, are to be determined by the rules of the common law, we have examined the record in this cause for the purpose of determining whether an error was committed by the court below, in the trial, by which the plaintiff, appellant has been prejudiced.

The action is one, which in one count seeks to recover damages at law for the flooding of plaintiff's land; and in another count seeks equitable relief against defendant, who is charged with having erected a dam and constructed a ditch, diverting the natural flow of water from its course to plaintiff's injury.

The suit was instituted against two defendant land owners, who answered separately, defendant Hemsath's answer being the general issue and the statute of limitations. Upon the trial of the legal issue before a jury, and after the close of the testimony plaintiff dismissed as to defendant Linnemann, and the case was submitted to the jury on the legal issue against Hemsath, the respondent, alone. The jury found a verdict for the defendant, and subsequently the equitable cause of action being submitted to the court upon the same testimony, the court found the issues likewise for defendant, and dismissed plaintiff's bill.

As the right of action in cases of this character is controlled by the particular facts of each case, a detailed review of the testimony is essential to determine whether plaintiff has shown himself entitled to either legal or equitable relief. The testimony, which is almost wholly free from conflict, seems to establish the following facts with reasonable certainty: The Cork Hill or Caulk Hill Branch is a dry ravine, from one-half to three-quarters of a mile in length, and draining in connection with other small ravines, which empty into it, a hilly surface of considerable extent. The water coming down this ravine is the result of rains and melting snows, and has washed out a

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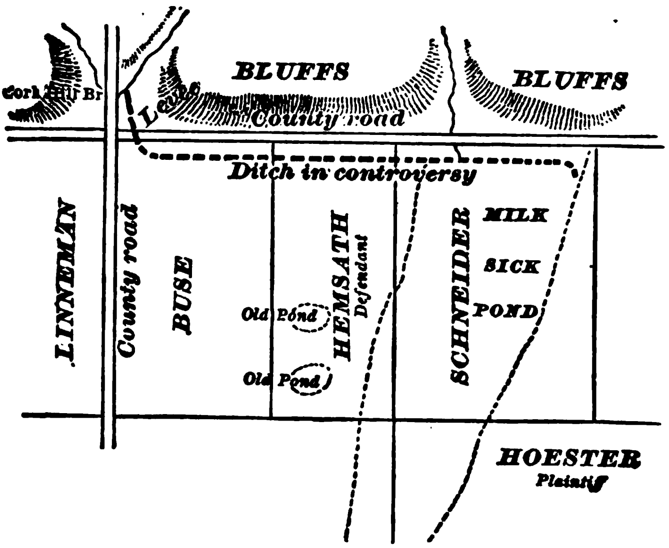
bed with more or less defined banks, but there is no living stream running in this bed, and whatever springs there are in the ravine are wet weather springs, which dry up entirely with the approach of warm weather. Plaintiff himself testifies the "the water coming down these branches is all rain water, there is no creek or living stream," and one of his witnesses (Kaltmeyer) says, that "the Caulk Hill Branch is a dry branch or ravine, which carries off the rain and snow water from the hills." It may be said therefore that touching the character of this water-course there is no controversy whatever.

It appears from a survey made by order of the trial court, a plat whereof has been offered in evidence and forms part of the record in this cause, that the lands of plaintiff and defendant lie in the bottom, at and near the foot of the hills from which the water comes through this branch or ravine, and that the location of lands of the parties respectively, and of the ditch in controversy is as shown by the following sketch: —



A witness for defendant (Peter) testified, without contradiction, that as early as fifty-five years ago the water coming down Cork Hill Branch ran along the foot of the bluffs directly into the slough or pond marked by dotted lines on the above sketch, and known as Milk Sick Pond, and a witness for plaintiff (Heisel) testified that the water from the branch would all go into Milk Sick Pond twenty years ago. In fact there is no controversy in the testimony but that Milk Sick Pond is the lowest place in the vicinity, and that the waters coming from the bluffs are liable to run into it, and the only contention plaintiff makes is that before the digging of the ditch complained of, they first spread over the Linnemann, Buse, and Hemsath lands before reaching the pond, and are now conducted directly to the pond through the ditch constructed by defendant.

About fifteen years ago Buse, defendant's grantor, built a levee or dam at the place where the branch left the bluffs, and also constructed a ditch next to the county road to keep the water from his own lands. This ditch the defendant subsequently continued, and about seven years ago, with the consent of Schneider, he completed it so as to carry the waters directly into the slough or pond. There was testimony tending to show that during the last few years the water in the pond was higher than it had been in former years; that it flooded the plaintiff's land and caused him serious injury. But whether this rise in the water in the pond was due to its gradual filling up, by brush and logs and the *detritus* of the neighboring bluffs, or to the fact that the waters reached it by a more direct route than formerly the testimony left in doubt.

The rule of the common law on the subject of surface water was thus stated in *McCormick* v. *Railroad Co.* (57 Mo. 433): "The general rule, however, is that either municipal corporations or private persons may so occupy and improve their land, and use it for such purposes as they

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may see fit, either by grading or filling up low places, or by erecting buildings thereon, or by making any other improvement thereon to make it fit for cultivation or other profitable or desirable enjoyment, *and it makes no difference that the effect of such improvement is to change the flow of the surface water accumulating or falling on the surrounding country, so as to either increase or diminish the quantity of such water which had previously flowed upon the land of the adjoining proprietors to their inconvenience or injury.* Ang. W. C. p. 122, sect. 108; *Goodale* v. *Tuttle*, 29 N. Y. 495; *Waffle* v. *N. Y. Cen. Ry. Co.*, 58 Barb. 413; *Turner* v. *The Inhabitants, etc.*, 13 Allen, 291; *Imber* v. *City of Springfield*, 55 Mo. 119, and cases there cited." The rule thus stated is to-day the unquestioned rule in this state. The only fact upon which the plaintiff, under the testimony above detailed and the rule above mentioned, was entitled to go to the jury, was this: Whether the injury complained of was the proximate result of defendant's act in collecting the surface water in his ditch and throwing it in one body into the slough or pond adjoining plaintiff's land. That fact was submitted by the court to the jury on instructions more favorable to plaintiff than he had a right to demand, and found by the jury adversely to him, and there is nothing in the record which would justify us to disturb that finding.

Nor is there anything in the record which would justify us to disturb the decree of the court in dismissing plaintiff's bill. That the jury have by their verdict negatived any injury for which defendant was responsible would tend to show that the action of the court was correct, even regardless of the fact that all the parties were not before it to enable it to make a final decree. A full and careful examination and analysis of the testimony has led us to the conclusion that the main cause of the plaintiff's injuries is a force which is beyond the remedial process of courts of

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chancery, the eternal force of detrition, which has leveled the mountains and filled the sea.

With the concurrence of all the judges the judgment is affirmed.

STATE OF MISSOURI, Respondent, v. CONRAD LEHR, Appellant. 16 491 141m333

February 24, 1885.

1. CRIMINAL LAW — PETIT LARCENY — MISDEMEANOR — FELONY. — The second offense of petit larceny is a felony.
2. —— APPELLATE JURISDICTION. — The Supreme Court alone has appellate jurisdiction of felonies.
3. —— APPEALS. — An appeal from a conviction of a felony, taken to the St. Louis Court of Appeals after November 4, 1884, will be dismissed.

APPEAL from the St. Louis Criminal Court, VAN WAGONER, J.

Appeal dismissed.

W. BUSCH, for the appellant.

M. F. MCDONALD, for the respondent.

ROMBAUER, J., delivered the opinion of the court.

This is a prosecution upon an indictment for a second offence of petit larceny, under section 1664, Revised Statutes, 1879. That section, among other things, provides "if any person convicted * * * of petit larceny * * * shall be discharged * * * upon compliance with the sentence, and shall subsequently be convicted of any offence committed after such discharge, he shall be punished as follows * * * if such subsequent conviction be for petit larceny * * * by a term in the penitentiary for a term not exceeding five years."

The only definition of felony in our statutes is "an offence for which the offender, on conviction, shall be liable

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by law to be punished with death, or imprisonment in the penitentiary." This, as construed by the supreme court, in *Johnston* v. *State* (7 Mo. 183), and *Ingram* v. *State* (7 Mo. 293), means any offence for which he may be so imprisoned.

While, therefore, petit larceny is a mere misdemeanor (sect. 1318, Rev. Stats. 1879), any person convicted of it, as for a second offence, under the provisions of section 1664, is guilty of a felony and punishable as such.

The indictment was found June 8, 1883, but the defendant was not tried until November 11, 1884, on which day he was tried, found guilty, and sentenced to imprisonment for two years in the penitentiary. From this judgment he took an appeal to this court on the 11th day of December, 1884. A statement of these facts suffices to show that this court had no jurisdiction of the appeal thus taken.

The fifth section of the amendment to the constitution, concerning the judicial department, adopted November 14, 1884, provides: —

"In all causes or proceedings reviewable by the supreme court, writs of error shall run from the supreme court directly to the circuit courts, and to courts having the jurisdiction pertaining to circuit courts, and in all such cases or proceedings, appeals shall lie from such trial courts directly to the supreme court, and the supreme court shall have exclusive jurisdiction of such writs of error and appeals, and shall in all such cases exclusively exercise superintending control over such trial courts."

And the eleventh section of the same amendment repeals in express terms all provisions of the constitution and all laws inconsistent with the amendment, upon its adoption.

The appellate jurisdiction of this court in cases of felony ceased with the adoption of this amendment, and all appeals taken after the 4th day of November, 1884, in such cases, had to be taken to the supreme court.

The appeal in this case not being taken on or prior to said day must be dismissed. It is so ordered. All concur.

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AUGUST WENGLER, Respondent v. MISSOURI PACIFIC RAILROAD COMPANY, Appellant.

February 24, 1885.

EVIDENCE — AGENT'S SUBSEQUENT DECLARATIONS — NEGLIGENCE. — In an action for damages for personal injuries occasioned by the negligence of a railroad company, it is error to permit a witness to testify that, a few days after the injury, the conductor who had charge of the train at the time of the injury, said that the bell was not rung, and that the train was running at an excessive rate of speed.

APPEAL from the St. Louis County Circuit Court, EDWARDS, J.

Reversed and remanded.

G. PITMAN SMITH, for the appellant.

ZACH J. MITCHELL, for the respondent.

THOMPSON, J., delivered the opinion of the court.

This is an action for damages for injuries which the plaintiff sustained while attempting to drive across the defendant's railway track at a crossing of a public highway. The negligence charged in the petition is the failure of the defendant to ring the bell or to sound the whistle of defendant's locomotive as required by section 806 of the Revised Statutes. The answer sets up contributory negligence. The plaintiff had a verdict and judgment.

Among the questions in dispute were, whether or not the train was running upon its usual and schedule time; whether or not it was running at its usual and card rate of speed; and whether or not the bell was being rung as it approached the crossing. Against the objection of the defendant, the court permitted the plaintiff's daughter to testify for the plaintiff, that a day or two after the happening of the accident, the conductor in charge of the train by which it was produced told her that at the time of the accident "they were nine minutes late and were just flying, and the engineer forgot to ring the bell." This testimony was distinctly objected to, on the ground that it was incompetent and on the ground that it related to a conversation which took place a day or two

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after the accident. The court nevertheless ruled that it was competent, saying: "This witness may state anything that was said to her by any officers who were in charge of that train at the time of this collision — anything that was said about it." This ruling was clearly erroneous. *Aldridge* v. *Midland Blast Furnace Co.*, 78 Mo. 559; *McDermott* v. *The Hannibal, etc. R. Co*,., 73 Mo. 516. It is obvious from the whole record that it was prejudicial to the defendant and we can not disregard it on the ground that judgment is for the right party, because it was for the jury to say upon competent evidence, which was the right party. The fact that the defendant's fireman and engineer admitted that the bell had only been rung for a distance of more than two hundred or two hundred and fifty yards from the crossing, does not conclusively show that the verdict was correct; because in these cases the law is that, although the servants of the railway company may disregard this statutory precaution, yet if the person injured failed to make prudent use of his faculties as he approached the crossing, by looking and listening for an approaching train, he can not recover. *Lenix* v. *Mo. P. R. Co.*, 76 Mo. 76; *Fletcher* v. *Atlantic, etc. R. Co.*, 64 Mo. 484. There was evidence tending to show that he might have done this before he drove upon the track, and that, had he done it, he would have seen the approaching train. Besides, incompetent evidence to the effect that the train men were driving their train at a reckless rate of speed, and at the same time disregarded the precautions prescribed by law for the public safety, would have a clear tendency so to affect the minds of the jury as to enhance the damages which they would otherwise be likely to give.

The appellant makes six other objections, but as he merely refers us to the record in respect of these, we shall not consider them; nevertheless, as this one objection is clearly well taken, we shall reverse the judgment and remand the cause. It is so ordered. All the judges concur.

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CITY OF ST. LOUIS, Respondent, v. J. D. CRUIKSHANK ET AL., Appellants.

February 24, 1885.

1. MUNICIPAL CORPORATIONS — PLEADING — CONDITIONS PRECEDENT. — In proceedings to open an alley founded on an ordinance which provides that it shall be void unless the owners of a certain described strip of land shall dedicate it for alley purposes within a given time, the petition must aver such dedication under the terms of the ordinance.

2. —— STREET OPENING — ASSESSMENT OF BENEFITS — EXCEPTIONS TO REPORT. — The owner of property against which benefits are assessed for the opening of a street may except to the commissioners' report on the ground that the ordinance upon which the proceeding is founded is invalid.

APPEAL from the St. Louis Circuit Court, HORNER, J. *Reversed and remanded.*

J. M. HOLMES, for the appellants: There must be averment and proof of performance, of a condition precedent appearing on the face of the cause of action. — *Bayse* v. *Ambrose*, 32 Mo., 484; *Mier* v. *Heinrichschoffen*, 52 Mo. 333; *Stout* v. *St. Louis Tribune Co.*, 52 Mo. 342; *Breicheisen* v. *Coffey*, 15 Mo. App. 80.

LEVERETT BELL and T. H. CULVER, for the respondent.

THOMPSON, J., delivered the opinion of tne court.

This is a proceeding by the city of St. Louis, under the provisions of article VI. of its charter, to condemn certain land for the purpose of an alley. Such proceedings were had that certain benefits were assessed against two lots of Mrs. Josephine B. Noonan. Mrs. Noonan filed a number of exceptions to the report of the commissioners in the circuit court, and these being overruled, and the report confirmed, she filed motions for new trial and in arrest of judgment, which were also overruled, and she then appealed.

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The exception principally insisted upon in this court is, that the petition shows on its face no cause of action. By the terms of section 2, article VI., of the charter, the city counsellor is authorized to apply in the circuit court for the appointment of commissioners, etc., "whenever the general assembly shall provide *by ordinance* for establishing, opening, widening, or altering any street, avenue, alley, etc. It is obvious, in view of this language, that a valid ordinance authorizing the establishment of the particular street or alley is necessary to the jurisdiction of the circuit court to proceed in the summary manner therein pointed out. The ordinance under which this proceeding was instituted, contained in section 3 the following provision: —

"This ordinance shall be null and void and have no effect, unless within ten days after the approval of this ordinance, the owner or owners of the lot of ground south of, and adjoining the alley as herein established, shall properly dedicate a strip of ground twenty feet in width extending from the south line of Benoist and Ewing's addition to the north line of the public school's subdivision of part of the United States survey three thousand and three, and the lines of said alley to be straight linear continuations southwardly of the lines of the alley herein established."

The petition does not allege, nor was any evidence offered tending to prove that this condition precedent, upon which the validity of the ordinance was made by its own terms to depend, had ever been complied with. It is a settled rule of pleading that, where a condition precedent exists, the performance of which is necessary to give a right of action, such performance must be alleged and proved. *Bayse* v. *Ambrose*, 32 Mo. 484. That was not done in this case, and, for aught that appears on the face of the proceedings, the dedication, without which it was provided that the ordinance should be null and void, may never have been made by the property owners therein named. We can not presume that it was made, from the

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mere fact that the city counsellor instituted this proceeding; but we must hold that, without averment and proof of the happening of the fact which the ordinance provides shall be necessary to its validity, it is of no validity. The case of *City of St. Louis* v. *Gleason* (15 Mo. App. 25, 588), upon which the plaintiff relies, is not in point. The question which was there decided had reference to an ordinance which was unconditional and valid upon its face; and we held that it was not necessary to the validity of the condemnation proceeding that the petition in the circuit court should recite the existence of facts which the charter requires to exist before the municipal assembly shall pass such an ordinance.

It is argued for the plaintiff that this objection should have been taken by the defendant either by demurrer or answer, and not by this exceptor after final judgment. We do not understand that it was not made before final judgment. This exceptor was not made a party, and therefore did not have an opportunity to make the objection by demurrer or answer, so far as appears. She voluntarily appeared and made her exceptions to the report of the commissioners, as she was allowed to do by section 7 of article VI. of the charter. This section does not distinctly limit the matters of exception; but it would be contrary to all analogy to hold that, where a party is allowed to except, he can not challenge in this way the validity of the whole proceeding. This is a summary proceeding, contrary to the course of common law. In such cases, the rule is that the circuit court is, *quoad hoc*, a court of special and limited jurisdiction, and that the essential facts upon which the law predicates its right to exercise the particular jurisdiction must appear on the face of its record. *Kansas, etc., R. Co.* v. *Campbell*, 62 Mo. 585, 588; *Werz* v. *Werz*, 11 Mo. App. 26, 31. In such a case as this a valid and operative ordinance authorizing the opening of the particular street or alley, is such a fact. Any person, therefore, injuriously

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affected by the proceeding may, if properly in court, raise such an objection.

The judgment of the circuit court will be reversed and the cause remanded. It is so ordered. All the judges concur.

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G. Eyermann, Appellant, *v.* E. Scollay et al., Respondents.

February 24, 1885.

1. **Special Taxes — Irregular Bills. — Under the St. Louis charter of 1870, a special tax bill was not void because not made out in the name of the real owner of the property sought to be charged, or because made out in the name of a deceased person.**
2. **—— Res Judicata. — A judgment in favor of the defendants on a special tax bill which is irregular, but not void, is a bar to a subsequent action by the same plaintiff against the same defendant on an amended tax bill for the same work.**
3. **—— Limitations — Amendments. — In an action on a special tax bill against a man who was dead, his heirs can not, after a right of action against them has become barred, be brought into the action by issuing amended tax bills, and amending the petition so as to make them parties to the action.**

Appeal from the St. Louis Circuit Court, Lubke, J.

Affirmed.

T. J. Cornelius, for the appellant: Where in a sut on a special tax bill, erroneously issued, there was judgment for the defendant, this is not a bar to a suit upon an amended tax bill afterwards issued by the city engineer for the same work. — *Pendergast* v. *Richards*, 2 Mo. App. 187; *Riley* v. *Cramer*, 51 Mo. 542; *Eyermann* v. *Provenchere*, 15 Mo. App. 256.

W. H. Clopton, for the respondents: The first bill was a valid one so far as the merits of a controversy between plaintiff and defendants were concerned. A judgment was

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entered for defendants and they are protected by it. — *City to use* v. *De Noure*, 44 Mo. 136; *Studler* v. *Roth*, 59 Mo. 402.

THOMPSON, J., delivered the opinion of the court.

This is an action upon three special tax bills issued by the president of the board of public improvements of the city of St. Louis, on December 28th, 1881, in lieu of one other special tax bill surrendered and cancelled, issued on October 29th, 1874, by the then city engineer of the city of St. Louis, under the then existing charter and ordinances, for work and labor done, and materials furnished by the plaintiff prior to that date, as a contractor with the city for the construction of sewers in a certain sewer district therein named. The original tax bill was made out against the land in the name of Leonard Scollay. Action was brought upon it at the October term, 1876, of the circuit court of the then St. Louis County, against Leonard Scollay alone. Thereafter the plaintiff, discovering that Leonard Scollay was dead, filed by leave of court his amended petition on the 1st day of May, 1877, upon the same tax bill, against the persons who are the defendants in the present suit. These defendants answered by their attorneys; an agreed case was drawn up, npon which the cause was submitted to the court, and the court thereupon rendered judgment for the defendants. One of the grounds of defence set up in that action by the defendants in their answer to the amended petition was, that the lien of the special tax bill sued on, had perished by the lapse of time, under a provision of the amended charter of 1870, reading as follows: "Whenever any such special tax bill issued heretofore, or hereafter to be issued, shall be paid, it shall be entered satisfied on the register of the comptroller's office; and any bill that is not entered satisfied within two years after its date, unless proceedings in law shall have commenced to collect the same within that time, and shall be still pend-

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ing, the lien shall be destroyed and of no effect against the land charged therewith."

The defendants in their answer in the present suit plead the former judgment in their favor, by way of estoppel. They also plead the same statute of limitations. At the trial, they put in evidence the record of the former suit, including the agreed statement of facts, in which the statute was set out.

The above is a sufficient statement of facts to show that the circuit court rightly rendered judgment for the defendants in this case.

1. The former action, brought by the present plaintiff against the present defendants, was upon substantially the same cause of action as the present action. The judgment of the circuit court in favor of these defendants and against this plaintiff in that action, rendered upon the merits, is, therefore, a complete bar to the present action, unless, as is argued, the two causes of action are not identical. The ground of this contention is that, by procuring from the president of the board of public improvements under the present charter the tax bills sued on in lieu of the one on which the original suit was brought, the plaintiff acquired a new cause of action. To sustain this position, the plaintiff appeals to our decisions in *Eyermann* v. *Blakesley* (13 Mo. App. 407), *Eyermann* v. *Provenchere* (15 Mo. App. 256), and *Prendergast* v. *Richards* (2 Mo. App. 187).

In those cases, this court held that, where work has been done under a valid contract with the city, and the proper ministerial officer of the city has made out a tax bill which, by reason of non-compliance with the charter or ordinances, is illegal and void, it is competent for him thereafter to correct his error by making out and issuing to the contractor a valid tax bill; that a recovery may be had upon such valid tax bill, and that a judgment for the defendant in a suit upon the void tax bill is not a bar to an action by

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the contractor upon the valid tax bill. In *Eyermann* v. *Blakesley* (*supra*), we also held that it was competent for the president of the board of public improvements, under the present charter, being the official successor of the city engineer under the former charter, to issue to the contractor a valid tax bill in lieu of a void tax bill issued by the city engineer. But those rulings do not help the plaintiff in the present case, because it does not appear that the tax bill issued to him by the city engineer on the 29th of October, 1874, was void. On the other hand, it appears to have been, so far as is shown, a good tax bill. The only infirmity which it possessed consisted of the fact that it was made out against the land, naming the owner as Leonard Scollay, who, it was admitted by the agreed statement of facts in the former suit, died in 1859. But it was held by the supreme court in *St. Louis* v. *De Noue* (44 Mo. 136), under the provision in the charter of 1867, which, in this regard, was substantially the same as that in the charter of 1870, that the provision requiring the city engineer to make out the special tax bill in the name of the owner of the lot of ground, was directory merely; and that a bill was a good bill, although the city engineer had committed an error in describing such owner. The insertion of the name of a wrong owner in the bill was regarded as a matter not essential, since no lien could be established against the land such as would bind the interests of the real owners, except by an ordinary judicial proceeding to which the real owners were parties. The former tax bill, not being therefore void, the president of the board of public improvements could not, by issuing to the plaintiff these new tax bills, give to him a right of action in respect of the work done and materials furnished as described in the old bill, which the circuit court had held he did not possess; nor could he revive in the plaintiff's favor a lien against the defendants' land which the circuit court had held not to exist. There is nothing in the case of *Kiley* v. *Cranor* (51 Mo. 541),

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which works against this conclusion; because there, although the amendment was merely formal, yet the amended bill was issued before any suit had been brought to enforce the lien.

2. It appears from the agreed statement of facts upon which the judgment in the circuit court in the former action was rendered, that the lien of the tax bill there sued on had expired by the two years' limitation prescribed by the charter of 1870. The action was originally brought against a man who had long been dead. It was brought in time to have saved the bar of the statute as to him, had he been living. But more than two years had elapsed since the issuing of the tax bill at the time of the filing of the amended petition by which the parties were brought in who are the defendants in this action. As to these parties, the filing of the amended petition was the commencement of the action. The action was therefore barred. This being so, it would be a wild dream to hold that the president of the board of public improvements could revive it by the ministerial act of issuing a new tax bill.

The judgment is affirmed. All the judges concur — Judge ROMBAUER on the first point only.

THOMAS WALSH, Appellant, *v.* ST. LOUIS EXPOSITION AND MUSIC HALL ASSOCIATION, Respondent.

February 24, 1885.

CONTRACT — INTERPRETATION — ARCHITECTS. — Under a written proposition made to certain architects for plans and specifications of a certain proposed building, under the terms of which proposition each architect should receive the sum of five hundred dollars for his plans, irrespective of relative merit, and which contained the further clause that: "The architect who is successful shall not receive five hundred dollars, but he shall be engaged as architect and superintendent, and shall be paid," etc.,

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the architect whose plans are accepted as the most meritorious of all, has a right of action for a refusal to employ him as architect and superintendent.

APPEAL from the St. Louis Circuit Court, ADAMS, J.
Reversed and remanded.
KLEIN & FISSE, for the appellant.
McKEIGHAN & JONES, for the respondent.

LEWIS, P. J. delivered the opinion of the court.

The petition sets forth that the plaintiff is an architect and superintendent, and has pursued his profession in the city of St. Louis for a great many years. That, in April, 1883, the defendant, having in contemplation the erection of a building for exposition and music hall purposes, solicited and invited the plaintiff to prepare designs and plans, etc., in a written proposal as follows:

"ST. LOUIS, April 19, 1883.

"*Mr. Thomas Walsh* —

"DEAR SIR: At a meeting of the board of directors of the St. Louis Exposition and Music Hall Association, held on the 18th day of April, 1883, the following resolutions were adopted: —

"*First.* That all architects, residents of this city, and five non-residents, be invited to prepare and submit designs.

"*Second.* That from those presented by residents, seven which shall be considered the most meritorious, shall be accepted and awarded five hundred dollars ($500) each, and the five presented by non-residents, shall each be awarded the same amount. All designs for which you pay five hundred dollars ($500) shall be the property of the association.

"*Third.* That it should be understood, that any foreign architect may submit a design, but if not accepted as the most meritorious of all, he will receive no compensation, and his design shall be returned

"*Fourth.* The architect who is successful shall not receive five hundred dollars, but he shall be engaged as architect and superintendent, and shall be paid, for performing such duties, the usual commissions as adopted by the American Institute and the St. Louis Institute of Architects.

"*Fifth.* That all architects entering for competition shall so notify the president or secretary on or before May 5, 1883.

"*Sixth.* That said plans or specifications shall be placed under seal in hands of the secretary on or before July 2, 1883, and that they shall be without names or marks to indicate by whom made.

"*Seventh.* That there shall be ground plans of the severa floors, drawn to a scale of one-sixteenth of an inch to the foot, and elevations and cross and longitudinal sections, drawn to a scale of one-eighth of an inch to the foot, with descriptive specifications. Elevations to be geometrical and in line supply. No perspective drawings will be admitted. All plans must be simply tinted in India ink. No shaded drawings will be admitted.

"*Eighth.* The said designs and specifications shall be for a building to cost not over four hundred thousand dollars ($400,000), exclusive of power, electricity, and elevator machinery, arrangements for which, however, must be made.

"*Ninth.* As to the building itself, and what architects should be requested to include in their plans, we recommend the following features: —

"*First.* That building shall not cover more than 480x320 feet.

"*Second.* A music hall, with seats 20x30 inches, to seat four thousand people, and arranged so that it can be used for balls, exhibits or dramatic purposes. That the stage shall be large enough to accommodate an organ and seat one thousand persons. The hall to be well lighted, ventilated, and with perfect acoustics.

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"*Third.* A small hall to seat one thousand two hundred persons, with suitable stage.

"*Fourth.* A basement under building, to be arranged for machinery, carriages, and other heavy exhibits, and for power shafting.

"*Fifth.* Fine art rooms, for display of pictures and statuary.

"*Sixth.* Floral hall that will provide for rockery and water displays.

"*Seventh.* General exhibit hall for all articles.

"*Eighth.* Dressing-rooms, closets, etc., for public use.

"*Ninth.* Boiler rooms, coal sheds, etc., away from building.

"*Tenth.* Arrangements for elevators to high parts of building.

"We trust that you will give the above your immediate attention, and notify the secretary at once of your intention to furnish plans.

"Yours respectfully,

"HENRY V. LUCAS,

"*Secretary.*

"N. B.—You can see survey of ground at my office, 322 Pine Street."

The petition further avers that the plaintiff duly notified the defendant of his intention to act upon the said proposal, and that he thereupon prepared and submitted two designs in full accordance with the terms thereof. That "the designs, plans, elevations, sections, and specifications prepared and handed in by him to said defendant were, upon examination and consideration by the defendant and its board of directors, considered and declared as the most meritorious of all those that had been submitted to it under said proposal, and that the same were accepted by said defendant as such, and thereby the plaintiff became and was the successful architect within the purview and meaning of

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said proposal; and the plaintiff says that the defendant after so accepting his designs, plans, elevations, sections, and specifications, retained the same and still retains the same, and is now using the same, in part, in the erection of the building," etc. The petition avers the plaintiff's tender and offer to the defendant to assume and perform the work of architect and superintendent, and his present readiness and willingness to assume, perform, and discharge the same. "And the plaintiff says that the defendant, wholly unmindful of and in disregard of its just and legal obligations and duty in the premises toward the plaintiff, has refused and still does refuse to engage the plaintiff as architect and superintendent as aforesaid, to the damage of the plaintiff in the sum of twenty thousand dollars." The circuit court sustained a demurrer to this petition, on the ground that it did not state facts sufficient to constitute a cause of action.

No question is raised as to the sufficiency of the proposal made by the defendant and its acceptance by the plaintiff, to constitute a binding contract of some sort, for the breach whereof by one party a right of action might accrue to the other. But the defendant objects that nothing in its proposal implies an obligation, in any event, to employ as architect and superintendent the person whose design should be found the most meritorious or acceptable of all that might be submitted; and therefore no right of action is shown in the plaintiff, for the defendant's refusal so to employ him. The plaintiff contends that such an obligation appears in the fourth clause of the proposal, which we here repeat for convenient reference: —

"*Fourth*. The architect who is successful shall not receive five hundred dollars, but he shall be engaged as architect and superintendent, and shall be paid, for performing such duties, the usual commissions as adopted by the American Institute and the St. Louis Institute of Architects."

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Who is the person intended by the expresssion "the architect who is successful," and to whom the promise is made, that he shall be engaged as architect and superintendent upon the terms specified? The defendant answers, that the expression means, not "the architect presenting the best plans, but the one who should be in fact employed by the defendant." In other words, the defendant means only to promise that the one who shall be in fact employed as architect and superintendent, shall "be engaged as architect and superintendent." The unreasonableness of this interpretation is not limited by its imputation of tautology and surplusage. The whole tenor of the proposal demonstrates that no such application of the words was thought of in its framing.

An invitation is extended to a large number of architects to devote their thought, labor, and skill to the production of designs, from which one is to be selected for a costly exposition building. These designs are to comprehend many details and complications, demanding, perhaps, several months of application and the highest order of constructive talent. The leading idea pervading the whole invitation, and specially indicated in the fifth clause, is that of competition, in which some one is expected to be successful. Competition in what? Not in efforts to obtain the superintendency; for, aside from other considerations, the defendant says it proposed no competition for that object, and no such reward in any event, but was to be left absolutely free in its selection of a suitable person for the position. The competition, then, was to be in efforts by the competitors, respectively, to produce the most acceptable design. Who will be "successful" in this competition? Clearly, the architect who achieves its object. If, therefore, the plaintiff, as he avers, did prepare and hand in "designs, plans, elevations, sections, and specifications," which were, "upon examination and consideration by the defendant and its board of directors, considered and

declared as the most meritorious of all those that had been submitted to it under said proposal, and the same were accepted by said defendant as such," he thus became and was the successful architect, to whom the fourth clause of the proposal distinctly promises the superintendency.

It is not to be conceived that either party, in the making of the contract, contemplated any such effect as is now claimed for the defendant. Referring to the second clause in the proposal, it appears that five invited non-resident architects were to receive, each, $500 for their designs, absolutely, without regard to their comparative merits. If no further inducement was to be understood, why should these concern themselves about any approach to excellence in their several designs? They had only to send in plans conforming clerically to the stipulations, and to feel assured of the same reward, even if the productions were gotten up with little labor, and were comparatively worthless. The same may be said as to the seven resident architects, supposing (which is quite possible) that only seven residents should contribute designs. Their seven designs would, of course, be the most meritorious of the home productions, whatever might be their real want of value. A far more rational understanding may be found in what is conveyed by the plain words of the proposal. An offer of the superintendency is held out to the architect who shall surpass all others in the excellence of his design, whether he be a resident, or an invited or uninvited non-resident. That this common stimulus is intended for all, is obvious from the reading of the first, second, and third clauses. The five invited non-residents are to be paid $500 each, whether successful or not. Nothing is said, here or elsewhere, about paying that sum to the uninvited non-resident in any case. Yet it is implied in the third clause that, if his designs shall be "accepted as the most meritorious of all," he is to receive a compensation. What compensation? Naturally he will become the "architect who is successful," and will have earned the

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superintendency under the fourth clause. This will be his compensation — still without the $500, as would be the case with any other competitor who might be successful. The term "compensation," is by no means limited to a payment in money; especially where another form of compensation appears as a subject of treatment also, in the same transaction. This makes the proposal and the contract consistent throughout. Twelve selected architects are to be paid $500 each for their trouble in preparing designs, even though no one of them shall produce the best. Any one of all, whether of the twelve or not, who shall produce the best and most acceptable design, will be rewarded with the superintendency, but "shall not receive $500."

Argument is offered to show that the defendant could not have intended to bind itself to an appointment of the successful competitor as superintendent of the work, because that might necessitate the appointment of one personally unfit to be intrusted with such a position. In the absence of any reservation on that point in the proposal, it might be difficult to determine what character or extent of personal unfitness would justify the defendant in refusing to perform its promise. But, in any view of that question, it would be wholly a matter of affirmative defence, which the plaintiff could never be called upon to negative by anticipation, and which is entitled to no consideration upon a demurrer to the petition. Even if there had been a reservation in the proposal, of a right in the defendant to reject for personal unfitness, it might become a question whether the letter addressed to the plaintiff by the defendant, in this case, specially inviting him to compete for the prize held in view, would not amount to a direct admission of his fitness to earn and receive it, and a waiver of the reservation, so far as it might affect him.

Not finding the petition open to the objections offered against it, we reverse the judgment and remand the cause, with the concurrence of all the judges.

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BOATMEN'S SAVINGS BANK, Respondent, v. OVERALL, Appellant.

February 10, 1885.

1. **CHATTELS — POSSESSION EVIDENCE OF TITLE. — That a man deposits money in a bank in his own name and draws it out on his personal check is *prima facie* evidence that the money is his.**
2. **FRAUDULENT CONVEYANCES. — An insolvent person may make a voluntary transfer of property to his wife which will be good as against subsequent creditors, unless it is made with the intent to hinder, delay, or defraud them.**
3. **INSTRUCTIONS. — It is error to instruct the jury upon a hypothesis not warranted by the evidence.**
4. **EVIDENCE. — A jury can not find the existence of a fact merely because a discredited witness has testified to the non-existence thereof.**

APPEAL from the St. Louis Circuit Court, LUBKE, J.
Reversed and remanded.
HOUGH, OVERALL & JUDSON, for the appellant.
W. B. THOMPSON, for the respondent.

ROMBAUER, J., delivered the opinion of the court.

This cause presents some close questions, and it is not without hesitation that we have arrived at the conclusions announced in this opinion.

The appellants are garnishees on attachment proceedings brought against one Wm. V. Kay, as indorser of two notes of the Missouri Cotton Seed Oil Company. The notes which were made by Kay as president of the company bore date November 13, 1880, and were payable sixty days after date. The indebtedness evidenced by them originated in November, 1879, and January, 1880.

The garnishees, who are attorneys at law, answering plaintiff's interrogatories, denied any indebtedness on their part to Wm. V. Kay, but admitted that at the date of the service of the garnishment, they did hold a check for $10,000, since

cashed, as proceeds of certain notes secured by deed of trust on the property of the Missouri Cotton Seed Oil Company, which notes they had received as attorneys from the agents of one Mary A. Tilden and one Jane G. Kay. They averred that said notes had been the sole, separate, and individual property of said parties in the proportion of $3,000 for Mrs. Tilden and $7,000 for Mrs. Kay, and that the debtor and defendant in the attachment suit, Wm. V. Kay, had no interest therein.

This answer was denied by plaintiff, the denial asserting that the money consideration of these notes secured by trust deed was furnished by defendant Kay. The denial further stated that Kay, being insolvent and intending to cheat and defraud his creditors, had pretended to transfer these notes to the agents of Jane G. Kay, his wife, and Mary E. Tilden, a relative.

Plaintiff's denial was contradicted by reply. The reply stating, among other things, that the garnishees had since the service of the writ upon them, parted with some of the funds, but had retained sufficient to cover plaintiff's claim.

The cause was tried by a jury upon these pleadings. Plaintiff gave evidence, showing that in the fall of 1880 Wm. V. Kay, the debtor, kept an account in his own name with the Bank of Commerce in the city of St. Louis; that on that account he deposited November 5, $5,000; November 8, $5,000; December 7, $375; December 15, $500, and December 16, $500, all in the year 1880. That $10,000 of this money, or thereabout, was loaned to the Missouri Cotton Seed Oil Company, and checked out by Wm. V. Kay's individual checks. That the company had on the 28th day of October, 1880, executed a deed of trust on its property to secure four notes, all bearing date October 27, 1880, and all payable six months after date, two of said notes being for $2,000 each and two for $3,000 each, which notes were payable to Wm. V. Kay, president, and were delivered to

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him, as security for the advances made, as above stated. That the deed of trust was not recorded until January 15, 1881. That the notes so made were the notes which subsequently came to the hands of the garnishees. Plaintiff also gave some testimony tending to show that Wm. V. Kay was in the latter part of 1880 in embarrassed circumstances, and probably insolvent.

The judgment, recovered by the plaintiff against Kay in the attachment suit, was also put in evidence. This being all the testimony for plaintiff, the garnishees demurred by instruction, but their instruction was refused.

The garnishees thereupon called Wm. V. Kay, the debtor, who testified in substance, that $10,000 of the money deposited by him with the Bank of Commerce, in November, 1880, was the money of his wife, Jane G. Kay; that he loaned $7,000 of this money, as agent of his wife to the Missouri Cotton Seed Oil Company, and took the notes of said company, and sent and delivered three of them, amounting to $7,000 to his wife. That the $10,000 above mentioned were part proceeds of sale of some real estate which his wife had owned in Lake Forest, Illinois, and which she had sold in November, 1880. That Mrs. Kay had instructed him to lend the money to the Missouri Cotton Seed Oil Company. That he had loaned $3,000 of the money of Mrs. Tilden to the company prior to this time, and gave to Mrs. Tilden one of the $3,000 notes secured by trust deed as security.

On cross-examination witness stated that the property at Lake Forest, Illinois, sold by his wife, had at one time stood in his own name. That in March or April, 1878, he transferred it to his son, Wm. G. Kay, who shortly thereafter transferred it to his, defendant's, wife. That the property stood in his wife's name for two years before she sold it in the fall of 1880. That he was solvent at the date of the transfer of the property to his son and wife, and that his embarrassments came from the failure of the oil com-

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pany in the early part of 1881. The manner of the witness, testifying, as far as preserved in the record, was such, as might have affected his credit with the jury, under the particular circumstances surrounding these transactions.

One of the garnishees then testifed that the notes were placed in the hands of his firm for collection by Wm. G. Kay, the son of the attachment debtor, who stated at the time that one note for $3,000 belonged to Mrs. Tilden and the others to his mother Jane G. Kay. The witness had no personal conference with these clients, and could not say whether he ever had received any written instructions from either of them.

This was in substance all the testimony bearing upon the instructions of the court.

At the close of the entire testimony, the garnishees again demurred by instruction, and the court again refused that instruction, but gave all other instructions asked by them.

There was no error in the action of the court in overruling the demurrers to the evidence.

It is true that under the pleadings the burden of proof in the first instance was upon the plaintiff. *Holton* v. *Railroad Co.*, 50 Mo. 151. But when plaintiff had shown, without contradiction, that the consideration of the notes, out of which the fund held by the garnishees arose, consisted of certain money held and controlled by the attachment debtor, that these moneys had been deposited by him in his own name in bank and were thence drawn on his individual checks, plaintiff did make a *prima facie* case, rebutting the case made by the garnishees' answer. Possession of personal property is presumptive evidence of title. 1 Greenl. Ev. sect 34; *Simmons* v. *Austin*, 36 Mo. 307.

The plaintiff was entitled at the close of its case to have the question of title submitted to the jury. It was sufficient to shift the burden of proof. And plaintiff was entitled at the close of the entire testimony to have the question submitted to the jury, whether its *prima facie* case was

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avoided by the testimony of the defendant in the attachment, unless we first find that that testimony was such that the jury was bound to give credence to it, as a matter of law.

We have said in a recent case that "where the testimony offered in support of the allegations of the party who sustains the burden of proof is, if believed, sufficient to make out his case, and is clear, consistent with itself, delivered by an unimpeached witness, and no circumstance is developed tending to cast suspicion upon it, it must be believed in the absence of controverting testimony." *Lionberger* v. *Pohlman*, *ante*, p. 392. But the testimony offered by the garnishees, being the testimony of the attachment debtor, fails to meet several of these requirements.

There was, therefore, no error in refusing garnishees' demurrers to the evidence at any stage of the trial, and if the court had stopped there, and the jury would have found for plaintiff as they did, we would not have disturbed the verdict, as the only objection that could have been urged against it would have been that it was against the weight of evidence.

But the court went further. At the request of plaintiff it instructed the jury: —

"3. If the jury believe from the evidence in this case that the money loaned to the Missouri Cotton Seed Oil Company was the proceeds of the sale of real estate in Illinois, which was conveyed to a son of Wm. V. Kay, and which at the time of such conveyance belonged to William V. Kay, then said proceeds of sale coming to the possession of Kay, if he was then insolvent, could not be lawfully assigned to his wife while he was insolvent: and if the jury find that the money in the hands of the garnishees was the proceeds of the loan of said funds, then the jury will find for plaintiff.

"4. The jury are instructed that if they find from the evidence that the money deposited in the Bank of Com-

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merce was reduced to the possession of Wm. V. Kay, as his money, with the consent of his wife in the state of Illinois, and brought into this state and loaned to the Missouri Cotton Seed Oil Company as his money, and again transferred to his wife after he became insolvent, and to hinder, delay, or defraud his creditors, then the jury will find for the plaintiff, notwithstanding they may believe from the evidence that said money was the proceeds of real estate sold belonging to the defendant William V. Kay's wife."

Neither of these instructions can be justified under the facts of the case.

The law in regard to voluntary conveyances is very simple. A conveyance made without consideration is void as to existing creditors, regardless of intent; as to subsequent creditors, it is void only when made with intent to hinder, delay, or defraud them. *Payne* v. *Stanton*, 59 Mo. 159; *Hurley* v. *Taylor*, 78 Mo. 238; *Fisher* v. *Lewis*, 69 Mo. 629.

The conveyance made by Kay, the debtor, to his son in March or April, 1878, and more than twenty months before the inception of plaintiff's claim, could not be questioned by plaintiff. The only transfer of property that could be challenged as fraudulent was the assignment of the notes by Kay to his wife, at the time when he was a debtor of plaintiff and probably insolvent. His testimony was to the effect that the money was that of his wife, the proceeds of the sale of some real estate belonging to her, and given to him for the purpose of loaning it to the corporation, whose notes, given for this money, he returned to his wife. If this be true he never had any title to these notes which he could assign. The fourth instruction asked by the plaintiff, and given by the court, tells the jury that if they find that the money in the Bank of Commerce "was reduced to the possession of Wm. V. Kay as his money, with the consent of his wife," etc. We find no evidence in the record to

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support this instruction, unless we can assume as a legal proposition that a jury may, when a fact is asserted by a discredited witness, not only disbelieve him, but consider his assertion of one fact as affirmative testimony of another fact diametrically the reverse. This we must decline to do.

The third instruction asked by plaintiff and given by the court is obscure in meaning, and tended to mislead the jury. If Wm. V. Kay transferred property to his son, prior to the inception of plaintiff's claim, and without any presumable intent of hindering the plaintiff, the property became that of his son, and we can not see how the proceeds of that property, coming afterwards to the hands of Wm. V. Kay, could not lawfully be assigned by him, except as against his son, to anybody. If he gave the property of his son away, that son is the proper party to complain, and not his creditors. If that instruction was framed to convey the idea that the conveyance to young Kay was a mere cover, the real title to the property remaining all along in Kay, the debtor, and that when the property was sold the proceeds thereof became the property of the debtor, then, its language was very inaptly chosen.

While we are loth to disturb the verdict of a jury on a question of fraud, being sensible that the offense is one much easier accomplished than prove, we deem it essential, that even in such cases, that regard be paid to the substantial elements of form, which long experience has shown to be essential to the proper administration of justice.

The judgment of the circuit court is reversed, and the cause remanded to be proceeded with in conformity with this opinion. All the judges concur.

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16 517
40 363
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W. W. STEWART, Respondent, *v.* S. C. CABANNE, Appellant.

February 10, 1885.

1. ATTACHMENT — EVIDENCE. — The grounds of attachment being alleged in the alternative, it is sufficient to support a verdict for the plaintiff if the evidence supports either of the grounds.
2. —— VERDICT. — A verdict that the defendant was about to "fraudulently convey *and* assign" his property so as to "hinder *and* delay his creditors" is good.
3. —— FRAUDULENT CONVEYANCES. — A conveyance is fraudulent in the sense that it will support an attachment if made by the mortgageor with fraudulent intent, although it may be valid as to the second creditor secured.
4. —— AFFIDAVIT. — An affidavit in attachment which reads: "The defendant ——— about fraudulently to convey and assign ——— property and effects so as to hinder and delay ——— creditors" may, on the trial, be amended by inserting the word "is" in the first blank, and the word "his" in the second and third blanks, where it does not appear that the amendment would prejudice the defendant.

APPEAL from the St. Louis Circuit Court, LUBKE, J. *Affirmed.*

R. W. GOODE and A. R. TAYLOR, for the appellant.

L. S. METCALFE, JR., G. M. STEWART and G. A. FINKELNBURG, for the respondent.

ROMBAUER, J., delivered the opinion of the court.

This is a suit by attachment. Five of the statutory grounds of attachment are assigned in plaintiff's affidavit. It is well settled that if the evidence, under correct declarations of law, supports any of the grounds relied on in the affidavit for an attachment, it will support a verdict of the jury for plaintiff. In this case the jury were instructed by the court, that if they found for plaintiff on some, but not all of the grounds alleged, they should specify the grounds upon which they find for plaintiff, and then state that they

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find for defendant as to the other grounds assigned in the affidavit. The jury returned the following verdict:—

"We, the jury, find that at the date of issuing said attachment, said defendant was about to fraudulently convey and assign his property and effects, so as to hinder and delay his creditors, as stated in the affidavit.

"We, the jury, find for the defendant as to the other grounds assigned in said affidavit."

The ground on which the jury found for plaintiff was one of the five grounds assigned, and judgment was entered for plaintiff on the plea in abatement.

It is claimed by defendant that this verdict is bad, because it uses the word *and* in three places, where the word *or* would have been sufficient, that is that the jury found more than was sufficient to justify the attachment. The case of *Crow* v. *Beardsley* (68 Mo. 439), is referred to in support of that view. There, the jury were instructed that, in order to find for plaintiff, they should find that the deed was made to hinder, delay, *and* defraud defendant's creditors. The instruction there given was held bad on plaintiff's appeal, the court holding that an intention to either hinder *or* delay *or* defraud was sufficient. If the instruction would have been held bad on defendant's appeal we might see some relevancy in the reference. The defendant here can not complain, that the jury did not find that he was about fraudulently to convey *or* assign his property *or* effects, so as to hinder *or* delay his creditors, when they found that he was about fraudulently to convey and assign his property and effects, so as to hinder and delay his creditors, because the conjunctive necessarily includes the disjunctive.

The only ground on which the jury found for plaintiff being the one above stated, and the testimony in the record being ample to support the finding, the question arises whether the instructions of the court on that part of the case were correct. There were sixteen instructions asked by the defendant, five of which the court gave, and eleven

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of which it refused. The court of its own motion gave three instructions to the jury, which embodied substantially all the law asked by defendant in his instructions refused, having any bearing on the question under investigation. The instructions given by the court of its motion, together with the instructions given on defendant's behalf, placed his case fully and fairly before the triers of the fact.

The defendant was a merchant, and the evidence tending to show his fraudulent intent to convey or assign his property, consisted of certain declarations made by him prior to the attachment, followed, immediately after the attachment, by the execution of a chattel mortgage to his mother for the sum of $6,000, covering all his stock in trade, and the execution of another mortgage for the sum of $2,000, to the same party, some time thereafter. There was evidence tending to show that the defendant had threatened shortly prior to the attachment to fix his property, so as to defy attachments. That he made many contradictory statements concerning his assets, liabilities, and solvency. That a short time prior to the attachment he declared himself solvent, and thereafter, within an interval of a few days, said in succession that he would not be able to pay more than ninety cents on the dollar, than seventy-five cents on the dollar, than twenty-five cents on the dollar, until immediately preceding the attachment, he addressed a circular letter to his creditors offering twenty cents on the dollar in full settlement of all his liabilities. There was also evidence tending to show that while he repeatedly spoke of his liabilities to his creditors, he never, until shortly before the attachment, mentioned his mother as a creditor, and that his mother's name was not on a schedule of his liabilities exhibited to one of the creditors shortly before the attachment.

Under these circumstances it was certainly no error to give plaintiff's sixth and seventh instructions, which seem

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to be those mainly complained of by defendant. These instructions were as follows:—

"6. If the jury believe from the evidence that when the mortgages to Virginia E. Cabanne, read in evidence, or either of them were made, the defendant was not in fact indebted to her in the amount therein stated, but that the same or either of them were executed for fictitious debts, for the purpose of covering up his property and effects, and in order to keep the same from the reach of his creditors, and that he had the intention of executing said mortgages or either of them when this suit was instituted, then the jury must find for plaintiff.

"7. Although the jury may believe that the mortgages dated June 11, 1883, and June 29, 1883, copies of which have been read in evidence, were executed by defendant for the purpose of securing *bona fide* debts due from defendant to his mother, Virginia E. Cabanne, and that said Virginia E. Cabanne may have acted throughout said transaction in good faith, yet if they find from the evidence that any part of the purpose of the defendant in making said deed was to keep off his creditors, or to hinder or delay them in collecting their debts against him, or to cover up his property from them, and that he intended or was about to make said conveyances or either of them with any such intent or purpose at the time this suit was commenced, then the jury must find a verdict for plaintiff."

Both are supported by the evidence and warranted by the law. *Enders* v. *Richards*, 33 Mo. 600; *Taylor* v. *Myers*, 34 Mo. 82; *Burgert* v. *Borchart* 59 Mo. 83, 84.

Defendant has also assigned as error the action of the trial court in amending plaintiff's affidavit for an attachment. After plaintiff had closed his case, and while one of defendant's witnesses was being examined, the trial court discovered that the affidavit whereon the attachment was

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issued was defective. The affidavit consisted, as the record shows, of a printed form, and some of the blanks left by the printer were not filled. The alleged ground of attachment on which the jury found for plaintiff, read thus: —

"That the defendant ——— about fraudulently to convey and assign ——— property and effects, so as to hinder and delay ——— creditors."

The court thereupon, against the objection of defendant, amended the affidavit and inserted the word *is* in the first blank, and the word *his* in the second and third blanks. This action of the court the defendant excepted to at the time.

There was no claim advanced by defendant that he was taken by surprise by this action of the court, or that he was not prepared to go on with the trial of the cause, or that on account of the filling of these blanks, he was practically injured in any way. He had taken issue on the affidavit as filed, all his witnesses were in court, and the whole proof which was heard by the court prior to the amendment, without any objection on part of defendant on that account, bore upon the facts that he *was* at the date of the attachment about fraudulently to convey *his* property and effects, so as to hinder and delay *his* creditors.

We are free to say that if the omissions in the affidavit and its subsequent amendment would have been shown to have in any manner substantially prejudiced the defendant, we would not hesitate to vacate the verdict, although otherwise apparently just, on that ground alone. Our statute of jeofails was not devised to encourage slattern pleading or to educate a bar in carelessness.

But as there is nothing in the record to show that any injury was done defendant by the action of the court, as the amendment consisted only in supplying clerical omissions, so as to make the affidavit conform to what the affidavit intended to say, and to what the proof supported; as the amendment under the rule laid down in *Middleton*

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v. *Frame* (21 Mo. 412) was permissible; we are satisfied that this is not one of those cases where we are compelled by law to visit the negligence of the attorney on his unoffending client.

Judgment affirmed. All the judges concur.

16a 522
33a 246
33a 444
16 522
103m 210
44 345
16 522
64 202

A. M. EVANS, Respondent, *v.* ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Appellant.

February 10, 1885.

1. INSTRUCTIONS — EVIDENCE — FALSE TESTIMONY. — An instruction that if the jury believe that any witness has testified falsely to any material fact they may disregard his entire testimony, and which omits the elements of knowledge and willfulness, is erroneous.
2. —— A good affirmative defence being pleaded and supported by evidence, it is error to instruct the jury that they will find for the plaintiff if they believe the state of facts upon which his action is based, without adding the qualification, unless they believe that such affirmative matter of defence has been proved.
3. —— PRACTICE. — The error in giving such an instruction is not cured by the giving of a separate correct instruction as to the law governing such defence.

APPEAL from the St. Louis Circuit Court, HORNER, J.

Reversed and remanded.

H. G. HERBEL and BENNETT PIKE, for the appellant.

R. W. GOODE and E. A. B. GARESCHÉ, for the respondent.

ROMBAUER, J., delivered the opinion of the court.

The plaintiff is a locomotive engineer. He sued the defendant, a railroad corporation, for wages alleged to be due to him. The action was instituted before a justice of the peace, where plaintiff obtained judgment by default for $141.62, the whole amount claimed. Upon trial in the cir-

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cuit court, it appeared by the testimony that plaintiff was first employed to run a locomotive on mileage terms, and that subsequently on or about December 10, 1881, he was put in charge of a consolidated engine, as he claims on a hiring from month to month, and monthly wages of $115, and as defendant claims on a hiring for an indefinite period at a compensation at the rate of $115 per month. He was discharged without just cause, as he claims, and for just cause, as defendant claims, on the 23d of December, 1881.

The main controversy between the parties was as to whether the contract of hiring was, as plaintiff claimed it to be, or was as defendant claimed it to be.

While the case was pending on appeal in the circuit court, the plaintiff called upon defendant and received from its paymaster $54.60, executing at the time a receipt, of which the following is a copy: —

"St. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY,
"To A. M. EVANS. DR.
"[St. Louis Division.]

"For services as engineer under the direction of ——— on St. L. D., as returned on roll record, No. 40, check No. 245, and registered in the office of the general auditor, in the month of January, 1882, 17½ days at $— say doll. 100 per day; amount $67 35
Less board bill 12 75

"Amount due $54 60

"I certify the above to be a correct transcript from the roll above named, and that the same remains unpaid.

"J. T. K. ———, *Clerk*,
"*General Auditor's Office*.

"Dated 7, 26, 1882.

"Received of the Missouri Pacific Railway Company the sum of fifty-four 60-100 dollars ($54.60-100) in full for the above amount.

"A. M. EVANS.

"Witness: A. C. BATES."

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The signature alone was plaintiff's, the residue of the account and receipt, being prepared by defendant's officer. Plaintiff testified that he did not read the receipt when he signed it, that he told the person who paid him the money that it was not all that was due him, and that he never authorized the deduction of his board bill from his wages.

The fact that plaintiff had executed this receipt appeared in his cross-examination, and before he closed his case, and the defendant thereupon demurred to the evidence.

The court overruled this demurrer, and we think committed no error in doing so. The paper contains no elements of a release, and while evidence as an admission, is not conclusive evidence. On the main controversy, that is, the terms of the hiring, and the cause of plaintiff's discharge, the plaintiff's case was supported by his own testimony alone. That testimony was contradicted by some of defendant's witnesses, but not in direct terms. There was nothing in the testimony of either side which could justify the trial court to assume that any of the witnesses were wilfully disregarding the truth. The plaintiff admitted that he ran his engine faster, on some occasions than the regulations permitted, and also that he was drinking while on duty, but denied that he ever drank to excess, and the testimony of the defendant's witness on these points was not much different from his own. As to the contract of hiring, which was admitted to have been oral, the main controversy was as to whether certain words were used in the conversation. This being the character of the testimony the court among others gave the following instructions to the jury, on behalf of plaintiff, against defendant's objections: —

"2. The court instructs the jury that if they believe from the evidence that any witnesses had testified falsely as to any material fact in this cause then they are at liberty to disregard the whole of the testimony of said witnesses.

"4. The court instructs the jury that if they believe from

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the evidence that plaintiff was hired by the defendant as a locomotive engineer by the month, and that defendant agreed to pay plaintiff $115 per month for his services as locomotive engineer, then plaintiff is entitled to recover, and they may find in favor of plaintiff in such sum as they may believe from the evidence to be due him."

The jury rendered a verdict for plaintiff for $97.51, being the amount as claimed by him, less the $54.60 received and receipted for, and the court entered judgment upon the verdict and overruled defendant's motion for new trial and in arrest of judgment.

The defendant, among other things, now complains of the action of the court in giving plaintiff second and fourth instructions. The form of the second instruction is admitted to be incorrect, but plaintiff contends that it was a harmless error.

Instructions telling the jury that they may disregard the testimony of witnesses should be given with great care and discrimination, and not as a matter of course at the instance of either party, simply because there is some contradiction in the testimony of witnesses. The refusal of the second instruction, even if it would have been correct in form would have been no error under the testimony in this case. *Iron Mountain Bank* v. *Armstrong*, 62 Mo. 74; *White* v. *Maxcy*, 64 Mo. 559. The giving of it, even if correct in form, might have been error (*Batterson* v. *Vogel* 10 Mo. App. 235); while the giving of it in the form in which it was given, omitting the essential elements of wilfulness or knowledge was manifest error. *The State* v. *Elkins*, 63 Mo. 166; *Shenuit* v. *Brueggestradt*, 8 Mo. App. 46. It is not apparent why the instruction was asked at all, and still less apparent why it was given in form condemned by the uniform adjudications in this state.

The fourth instruction is equally objectionable. It purports to cover the entire case and authorizes the jury to find for the plaintiff, if they should find that he was hired by

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the month, regardless of defendant's evidence tending to show that he was discharged for cause. This point was ruled on in *Fitzgerald* v. *Hayward* (50 Mo. 523), and *Goetz* v. *Hannibal & St. Joe R. R. Co.* (50 Mo. 472), and it was decided in the latter case that an instruction which in that regard is erroneous, is not helped by an instruction given for the other side supplying the omission. As was said by this court in *The State* v. *Nauert* (2 Mo. App. 298): "A contradiction between two instructions, so far from correcting the evils of either, multiplies them in both."

We are asked to affirm the judgment of the trial court, notwitstanding these errors, because the amount in controversy is small, and the judgment is for the right party, and this justifies us to look into the weight of evidence for the purpose of determining whether its preponderance on part of plaintiff is such, that we are justified to presume that the jury have reached a correct conclusion, notwithstanding the incorrect instructions they received. The suit is one for wages by an employee against his employer, and that employer a railroad corporation. The sympathies, if not the prejudices of the jury would naturally be enlisted for plaintiff. His case rests upon his unsupported testimony. The great risks, which the defendant as a common carrier assumes, would dictate as a measure of ordinary prudence, the reservation of the right to discharge its employees in the carrying trade, for any cause deemed sufficient by itself. This it could not do without loss if it employed them for stated periods. As far as there is any evidence on that subject it would tend to show that if plaintiff's employment was for a stated period it was exceptional, and contrary to defendant's course in employing other servants of the same grade. Plaintiff's testimony, therefore, is opposed not only to the testimony of defendant's witnesses, but to the probabilities arising from surrounding circumstances. This is a sufficient reason why we ought not in this case exercise a power, which courts in all cases ought to exercise

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with the greatest care, that is, affirm a judgment regardless of the errors of the trial court, on the sole ground that it is just.

For errors of the court in giving the second and fourth instructions asked by plaintiff, its judgment is reversed, and the cause remanded.

All the judges concur.

W. TAYLOR, Respondent, *v.* A. J. FOX, Appellant.

16a	527
31a	472
16	527
44	238
16	527
45	432
16	527
82	631

February 10, 1885.

1. CONTRACTS. — EVIDENCE. — A written proposition from one person is not admissible to prove a contract unless it has been accepted by the other person

2. —— ESTOPPEL. — A person who is *sui juris* will not, in the absence of a fraud, be permitted to avoid his written obligation by showing that he did not read it nor hear it read.

3. —— A written contract which embraces all the items of a proposition and adds others, merges the proposition in the contract.

4. —— PRACTICE. — The written contract being undisputed, and there being no evidence of any other contract except the evidence of the prior proposition, it is error to submit to the jury the question whether there was more than one contract.

5. —— NEW TRIAL. — A new trial should be granted by the trial court where the verdict is manifestly against the weight and the entire current of the testimony.

APPEAL from the St. Louis Circuit Court, HORNER, J.

Reversed and remanded.

T. A. RUSSELL, for the appellant.

WALKER & WALKER, for the respondent.

THOMPSON, J., delivered the opinion of the court.

This was an action on an account commenced before a justice of the peace. In the circuit court the cause was

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tried by a jury, and the plaintiff had a verdict and judgment for $123.33.

1. The first point made by the defendant is that the circuit court erred in allowing the plaintiff to file an amended statement of his cause of action, and in not dismissing the suit on the defendant's motion, because of the insufficiency of the original statement. No exception was saved to this ruling, and therefore it can not be considered. By neglecting to save an exception to this ruling, the defendant put himself in the position of going voluntarily to trial on the statement as amended, and of waiving his objection to the original statement.

2. The next objection of the defendant is that the court erred in admitting in evidence the written bid submitted by the plaintiff to the defendant on November 1, 1879, for the doing of the work for which the action is brought. This objection is predicated upon the theory that this bid was not the contract under which the work was done; but that it was done under a contract signed by the defendant five or six days later, to wit, on the 5th of November, 1879. At the time this paper was admitted in evidence, it had not been shown that the proposition which it contained had been accepted by the defendant. Until this was shown, it did not appear that it constituted any part of the contract between the plaintiff and the defendant. Although the plaintiff testified that this bid was his contract, that testimony did not tend to show that it was the defendant's contract. It therefore stood as a mere proposition. But though it may have been irregular to admit it in evidence at the time when it was offered without something to indicate that it was to be followed up by evidence of acceptance; yet this irregularity seems to have been cured by what was brought out in a subsequent stage of the plaintiff's testimony, where he stated that this bid was accepted, and that he immediately went to work under it, and did the work under it.

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3. The work for which the action was brought was the building of a furnace in a photograph gallery, built, owned, and used by the defendant. It appeared, without dispute, that five days after the plaintiff had submitted to the defendant the bid in writing above referred to, the defendant's architect called upon the plaintiff at his shop, and submitted to him a formal contract for his signature, covering all that was agreed to by the plaintiff in his bid, but containing some further provisions in the defendant's favor; that this contract was read over to the plaintiff; that the terms of it were talked over between the defendant's architect and the plaintiff, and were understood by the plaintiff, and that the plaintiff thereupon took up a pen and wrote at the end of the contract the words, "I accept the above," and signed his name thereto. The plaintiff in his testimony states no fact tending to show that this paper did not embody the final agreement of the parties, unless the following statements made by him have such a tendency: "The paper of November 5, was brought to me by the architect. I did not read it. The architect may have read it to me, but there were other persons in my office, and if he did I did not hear it. I signed the contract without reading it."

This testimony, it will be perceived, has no tendency to negative the plain inference which arises from the fact that the plaintiff wrote upon the paper the words above stated, and signed his name to it; that this paper became his final agreement in the premises. It does not show, or tend to show, that he did not understand its contents from previous conversation, or that he made a mistake in signing it. If he had made such a mistake, it would not have made it the less his contract, unless the mistake was the mistake of both parties. A person who is *sui juris* can not deliberately sign a contract in writing, and then, in the absence of evidence creating any inference of fraud or imposition, be heard to say that such instrument is not his agreement. This paper was, then, undoubtedly the plaintiff's agreement;

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and, being such, it had the legal effect of merging the prior proposition of which his bid consisted. Now the court refused the following instruction offered by the defendant: "The jury are instructed that the plaintiff's cause of action grows out of and is based upon the contract in evidence of November 5, 1879. And to entitle the plaintiff to recover, he must prove to your satisfaction that he has complied with the terms of said contract. If, therefore, you find from the evidence that the furnace in question did not heat the gallery of defendant to his satisfaction in the very coldest weather, your verdict must be for defendant." And in lieu thereof, the court gave the following, which, it will be perceived, is the same as the instruction refused, with certain words interlined, which are shown by the brackets: "The jury are instructed that the plaintiff's cause of action grows out of and is based upon the contract in evidence of November 5, 1879 [if the jury believe that this was the only agreement entered into between plaintiff and defendant]. And to entitle the plaintiff to recover, he must prove to your satisfaction that he has complied with the terms of said contract. If, therefore, you find from the evidence that the furnace in question did not heat the gallery of defendant to his satisfaction in the very coldest weather, your verdict must be for defendant."

This instruction, it will be perceived, left it to the jury to say whether the paper of November 5, 1879, was the only contract between the parties. We think, for the reasons above stated, that there was no substantial ground afforded by the evidence upon which the court could submit such a question to the jury. A court should not submit to a jury a question about which fair-minded men could not possibly differ in opinion, because one of the parties unreasonably disputes it. This instruction, we think, had a tendency to mislead the jury.

4. This brings us to the fourth observation which we feel bound to make upon this record, in view of the assignment

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cf error that there was no legal evidence to support the verdict of the jury. By the instrument of November 5, 1879, the plaintiff agreed that the furnace should heat the defendant's photograph gallery in every respect to his entire satisfaction. The evidence is overwhelming to the effect that it not only failed to heat the gallery to the defendant's satisfaction, but that it failed to heat it sufficiently in cold weather, notwithstanding every effort was made to induce it to do so, and that it finally had to be taken out and another one put in its place. But as the bill of exceptions recites that the plaintiff introduced evidence tending to show "that the furnace heated the premises of defendant in a proper manner according to the terms of the contract," we should not be able, upon this record, to reverse the judgment upon this ground. But the verdict is so plainly against almost the entire current of evidence, that I take the liberty to say that, in my judgment, this was a case where justice had so plainly miscarried at the hands of the jury, that the trial court, in a proper exercise of discretion, should have set the verdict aside, on that ground alone.

For the error of submitting to the jury the question whether or no the contract of November 5, 1879, was the only contract between the parties touching the subject-matter of the suit, the judgment is reversed and the cause remanded. All the judges concur.

D. F. EISENHARDT, Respondent, *v.* S. C. CABANNE, Appellant. 16 531 62 449 16 531 68 31

February 24, 1885.

1. ATTACHMENT—PLEA IN ABATEMENT—INSTRUCTIONS.—In the trial of a plea in abatement in attachment, it is not error to instruct the jury to make a separate finding on each ground of attachment charged in the affidavit.

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2. —— VERDICT.—Under a separate finding for the plaintiff on all the grounds alleged, the verdict will not be disturbed if the finding as to some of the grounds is fully sustained by the evidence.

3. —— INSTRUCTIONS.—An instruction on the whole case must be so framed as to include the points raised by the evidence of the other party, and if it fails to do so, the court may change it so as to make it apply to the entire case.

APPEAL from the St. Louis Circuit Court, LUBKE, J. *Affirmed.*

R. W. GOODE and A. R. TAYLOR, for the appellant.

L. S. METCALFE, JR., G. M. STEWART, and G. A. FINKELNBURG, for the respondent.

ROMBAUER, J., delivered the opinion of the court.

This cause is in most of its features the same as the cause of *Stewart* v. *Cabanne* (*ante*, p. 517). The attachment was levied at the same time, against the same defendant and the testimony adduced by the plaintiff in the trial court in support thereof, is almost identical with that in the former case.

In some of its features, however, this cause is different from the former, and gives rise to questions which require an examination of points raised, beyond those raised and decided in the former case.

The plaintiff's affidavit here stated five grounds of attachment based respectively on the seventh, eight, ninth, tenth, and fourteenth clauses of section 398, Revised Statutes, relating to the intended and executed fraudulent disposition and conveyance of property and to the fact that the debt sued for was fraudulently contracted. The court among other things, instructed the jury as follows: —

"The court instructs the jury that if they find for defendant as to all the grounds of attachment assigned in plaintiff's affidavit, their verdict must be: We, the jury, find for the defendant on the plea in abatement in this cause. If they find for the plaintiff as to all said grounds, they will in their verdict say: We, the jury, find for plaintiff as to all said grounds alleged in plaintiff's affidavit for the at-

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tachment herein, and if they find for plaintiff as to some, but not all of said grounds, they will specify the grounds upon which they find for plaintiff, and then state that they find for defendant as to the other grounds assigned in said affidavit."

And the jury returned the following verdict: "We, the jury, find for plaintiff as to all the grounds alleged in plaintiff's affidavit for the attachment herein."

Judgment was thereupon rendered for the plaintiff. While it may be a novel practice in this state, to take the finding of the jury in this manner, it is a practice not only fully warranted by precedent elsewhere, but also commendable, because it enables the trial court to review more fully the correctness of the jury's finding on motion for new trial. Moreover, since a general verdict for the plaintiff would be supported by proof of any of the alleged grounds of attachment (*Tucker* v. *Frederick*, 28 Mo. 574), this practice can not possibly be prejudicial to the defendant.

There was testimony tending to support the grounds of attachment, that the defendant was about fraudulently to dispose of his property, and that he was about fraudulently to convey his property, so as to hinder, etc. This testimony, as in the Stewart case, consisted of his declarations made prior to the attachment, which, as far as they were made to third persons were admissible as declarations against interest, and as far as made to the plaintiff or his agents, on the same ground, and on the additional ground of estoppel. *Cocke* v. *Kuykendall*, 41 Miss. 65; *Roach* v. *Brannon*, 57 Miss. 490. These declarations were followed by the execution of certain chattel mortgages to his mother, one being executed immediately succeeding the attachment.

It may also be fairly claimed that there was sufficient testimony tending to show an executed fraudulent disposition and conveyance of the defendant's property, with intent, etc., to entitle the plaintiff to go to the jury on that part of his affidavit, under the very liberal rule in this state

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in regard to the extent of evidence sufficient for that purpose.

On the question as to whether the debt sued for was fraudulently contracted, there was evidence tending to show that the defendant stated to the plaintiff's agent at the time the debt was contracted that he owed probably six thousand dollars and that his assets were over twenty thousand dollars, and that a few months thereafter, he stated his assets at twelve thousand dollars and his liabilities at twenty-two thousand dollars, and offered his creditors twenty cents on the dollar, in full payment of his liabilities. This evidence, if true, was sufficient to avoid the entire sale for fraud (Hilliard on Sales, 437, 438; *Thurston* v. *Blanchard*, 22 Pick. 18), and therefore sufficient to show a fraudulent contracting of the debt.

The point made by the defendant, that the verdict of the jury in finding for the plaintiff as to all the grounds alleged, is not supported by the evidence is therefore untenable. But were it even otherwise, we would not feel justified to disturb the verdict, in a case where the evidence, under correct instructions by the court, fully supports some of the grounds of attachment, and justifies a general verdict for the plaintiff. *Tucker* v. *Frederick*, 28 Mo. 574.

In examining the instructions given and refused, we find them similar, and mostly identical with those given and refused in the cause of *Stewart* v. *Cabanne*.

The fifth and sixth instructions for the plaintiff, of which the defendant especially complains, we have recited, examined, and approved in our opinion in that case. We have also carefully examined the claim of the defendant that the court committed error in refusing his seventh, eighth, ninth, tenth, and eleventh instructions, and substituting in lieu thereof other instructions of its own, and find that there is no merit in such claim. The seventh instruction asked by the defendant, was given by the court of its own motion, without change, and so was the eleventh instruction asked

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by the defendant. The refusal of the defendant's eighth, ninth, and tenth instructions, was not only warranted, but demanded by the rules laid down in *Clark* v. *Hammerle* (27 Mo. 55), *Sawyer* v. *H. & St. Joe R. R. Co.* (37 Mo. 240), and *Fitzgerald* v. *Hayward* (50 Mo. 516), that "a party who asks an instruction on the whole case must so frame it as not to exclude from the jury the points raised by the evidence of the other party." The changes in these three instructions, and additions made thereto, by the court, was in the defendant's interest, who thus got the benefit of the law claimed by him, in the only form in which the court could legally grant it, that is by removing the objection of inconsistency, by making the instructions applicable to the entire case, and the entire charge harmonious.

We find no error in the record. All the judges concurring, the judgment is affirmed. 16 535 44 645

J. C. VAN BLARCOM, Appellant, *v.* J. T. DONOVAN, EXECUTOR, Respondent.

February 24, 1885.

1. PLEADING — ACCOUNT STATED. — In an action on an account stated, the defendant's assent to the settlement or balance stated must be averred.
2. CONTRACTS — OPTION — WAGERS. — Contracts for the sale and purchase of commodities with an intention not to deliver the same, but to merely settle the differences in the fluctuations in the market price, are void.
3. —— EVIDENCE — PRACTICE. — The evidence as to the legality of the transactions in controversy in this case is held to have been sufficient to take the case to the jury.

APPEAL from the St. Louis Circuit Court, HORNER, J.

Affirmed.

KRUM & JONAS, for the appellant.

BROADHEAD & HAEUSSLER and C. V. SCOTT, for the respondent.

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ROMBAUER, J., delivered the opinion of the court.

Every question, but one that is presented by this record, has been passed upon by former rulings of the supreme court and of this court, adversely to the plaintiff appellant. *Cape Girardeau R. R. Co.* v. *Kimmel*, 58 Mo. 83; *Kent* v. *Miltenberger*, 13 Mo. App. 503; *Ream* v. *Hamilton*, 15 Mo. App. 577.

The action was one upon an account exhibited as a claim against the estate of a decedent by plaintiff, who was assignee of the account, and there was judgment in favor of the defendant, both in the probate court and in the circuit court.

The plaintiff concedes in this court that the instructions given by the trial court to the jury are correct as abstract declarations of law, but contends that there was not sufficient evidence to support them. The defence rested upon the ground that the transactions forming the basis of the account between the plaintiff's assignor and the defendant's testator were gambling transactions of a character known as option deals. The evidence tended to show that the plaintiff's assignor was a commission merchant; that the transactions consisted of buying and selling grain and produce for future delivery, and that the gains and losses were settled between the parties according to differences in the market between the date of the supposed purchase and the date of the supposed delivery. Among all the transactions made between them, covering a period of one year, and consisting of a great many items, only one was attempted to be shown to be real and culminating in an actual delivery of the article, and that one could not be fastened by the plaintiff's testimony upon any particular item of the account. There was also testimony tending to show that no delivery of the commodities dealt in was intended, and that the parties themselves designated their ventures as "flyers," "deals," and "scalps."

We are of the opinion that there was ample testimony on

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which the question of the legality of these transactions could be submitted to the jury, and that the court committed no error in doing so on correct declarations of law.

The judgment, with the concurrence of all the judges, is affirmed.

C. FATH ET AL., Respondents, v. W. HAKE, Appellant.

February 24, 1885.

1. INSTRUCTIONS—FALSE TESTIMONY.—An instruction that if the jury believe that any witness has sworn falsely upon any material point they may disregard his entire testimony, omitting the element of wilfulness or knowledge, is erroneous.
2. —— Such an instruction is not harmless where there are two issues, one side of which is supported almost entirely by the evidence of one witness and on either of which a verdict might be rendered.

APPEAL from the St. Louis Circuit Court, HORNER, J.

Reversed and remanded.

BROADHEAD & HAEUSSLER, and C. V. SCOTT, for the appellant.

HOUGH, OVERALL & JUDSON, for the respondents.

THOMPSON, J., delivered the opinion of the court.

This is an action on what is alleged to be a stated account, embracing a large number of items of advances to cover losses, and charges by way of commissions, on sales and purchases of grain alleged to have been made by the plaintiffs, at the request of the defendant as his commission merchants. The answer denies (among other things), that the defendant ever assented to the balance therein shown, so as to give it the effect of an account stated, and sets up by way of special defence, that all the transactions for which the plaintiffs were entitled to make any charge

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against the defendant, were mere wager contracts, and hence illegal and void.

At the trial, which was had before a jury, the defendant testified distinctly that he had never assented to the account as correct, and that it was agreed between him and the plaintiffs, that these transactions were nothing but option deals, and that he need not receive any thing nor deliver any thing.

At the request of the plaintiffs, the court instructed the jury as follows: "The court instructs the jury that they are the judges of the credibility of the witnesses, and if they believe that any witness has sworn falsely upon any material point, they have the right in their discretion, to reject his testimony altogether." This instruction, it will be perceived, is in substantially the same language as the instruction which was held erroneous by this court, in the recent case of *Evans* v. *Railroad Co.* (*ante*, p. 522). It is not denied that by reason of omitting the essential element of wilfulness or knowledge, the instruction was erroneous in point of law; but it is claimed that in the state of the evidence in this case, it was harmless. It is quite apparent that we can not so hold. The jury found for the plaintiffs. The instruction was manifestly directed against the testimony of the defendant himself. Now, the jury might well have believed the defendant's statement that the understanding was, that these were nothing but option deals, and, at the same time, have believed him mistaken in testifying that he never assented to this account as correct, and agreed to pay it; or they might have believed his statement on the latter point and believed that he was mistaken on the former; in either of which cases, their verdict, under the law and the other instructions of the court, must have been for the defendant. But this instruction had the effect of telling them that they might disregard his testimony as to both of these issues, if they should find him mistaken as to one of them. It is quite plain that such an

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instruction can never be held harmless where there are two issues, one side of which is supported almost entirely by the testimony of a single witness.

The judgment is reversed and the cause remanded. All the judges concur.

STATE OF MISSOURI EX REL. N. C. HUDSON, Respondent, *v.* K. C. MILLER ET AL., Appellants. 16 539 127m371 16 539 85 142

February 24, 1885.

1. BACK TAXES — EVIDENCE. — A tax bill can not be excluded, in an action for back taxes, because it is signed by a deputy collector.
2. —— In such an action, it is competent to show that the person who signed the tax bill as deputy collector was in fact a deputy collector.
3. —— PARTIES. — It is not necessary to make parties to such an action persons who have acquired interests in the land subsequently to the assessment of taxes.
4. —— PRACTICE — PAPERS FILED WITH PLEADINGS. — It is sufficient if the tax bills sued on are filed with the amended petition.

APPEAL from the St. Louis Circuit Court, THAYER, J.

Affirmed.

A. R. TAYLOR and W. H. CLOPTON, for the appellants.

KING & CHAPIN, for the respondent.

THOMPSON, J., delivered the opinion of the court.

This is a suit for back taxes under the act of 1877 (Rev. Stats., sect. 6824, *et seq.*). The plaintiff had a judgment. It does not seem necesssary to do more than notice briefly the points of objection made by the two defendants, Dunn and Clopton, who alone have appealed.

I. The first objection is, as nearly as we can gather it from the appellant's brief, that the court erred in admitting in evidence a certified copy of the commission of Henry A. Voelkner as deputy tax collector. There was no error in

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this ruling, unless the next objection of the defendants was well taken.

II. This was, that the court erred in admitting in evidence certified copies of the tax bills sued on, because they appeared to have been signed by Henry A. Voelkner, deputy collector, and not by the collector alone. They were signed by the name and official title of the collector, with the addition, "per H. A. Voelkner, deputy." This objection has nothing in it. By section 33 of the charter of the city of St. Louis, of which we take judicial notice, it is provided that "the collector may appoint deputies, by an instrument in writing duly signed, and may also revoke any such appointment at pleasure, and may require bonds or other securities from such deputies to secure himself; and each such deputy shall have like authority in every respect to collect the taxes levied or assessed within the city or any part thereof, which by law is vested in the collector himself." Section 6743, Revised Statutes, which relates to tax collectors generally, is in substantially the same language. There is nothing in the argument that this language restricts the power of the deputy to the collection of taxes; since the power to collect taxes necessarily includes the power to make out and certify back tax bills, and to do all other acts necessary to the collection of taxes. It was, therefore, competent to show by a certified copy of his commission, which was competent evidence for that purpose, that the person who had certified these tax bills as the collector's deputy, was, in fact, such deputy.

III. Another objection made to the tax bills, when offered in evidence, was that they were not filed with the petition; they were filed with the amended petition on which the cause was tried, and that was enough.

IV. The next objection is that the tax bills do not conform to the back tax book, which was also put in evidence by the plaintiff. We do not see any substantial discrepancy between the bills and the book, nor do we see any ground

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for the assertion that the book was not maae out and delivered to the collector before the suit was brought. The book on its face shows the contrary.

V. Finally, it is argued that the assessment is not made in the names of all the persons who were apparent owners of record of the property. To show this, the defendants, Dunn and Clopton, put in evidence a deed from George C. Miller to Daniel T. Jewett, dated June 22, 1879, and a subsequent deed from Jewett to Edward C. Smith conveying interests in this land.

It is a sufficient answer to this petition to say that these taxes were assessed for the years 1875, 1876, and 1877, and that, under the law (Rev. Stats., sect. 6705), they consequently must have been assessed prior to the making of these deeds.

The judgment is affirmed. All the judges concur.

THE STATE OF MISSOURI EX REL. L. GARESCHÉ, Respondent, v. CHARLES SLEVIN ET AL., Appellants.

March 11, 1885.

1. **APPEALS.** — Cases pending on appeal in the St. Louis court of appeals at the passage of the act of March 4, 1885, in which the amount in dispute exceeded $2,500, are transferable, under the act, to the supreme court.
2. —— **CONSTITUTIONAL LAW.** — The act of March 4, 1885, does not confer any power in excess of, and does not conflict with, the constitutional amendment of November 4, 1884.
3. —— **COURTS.** — In the matter of the establishment, continuance, or discontinuance of its own courts each state is sovereign, and in establishing or discontinuing courts a state violates no provision of the constitution of the United States.

Motion to hear the cause denied.

E. C. SLEVIN, for the appellants.

J. L. HORNSBY, for the respondent.

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Rombauer, J., delivered the opinion of the court on motion to proceed with the hearing of the cause.

This case having been docketed for hearing, we are asked to proceed with the hearing thereof, and to render judgment therein according to the merits of the appeal. We decline to do so, because under our construction of the act to provide for the certification and transfer of causes pending in the St. Louis court of appeals to the supreme court of Missouri, approved March 4, 1885, this court has no further jurisdiction or control of said cause except such as it must necessarily exercise in ordering its transfer to the supreme court.

As our ruling in this matter necessarily controls the disposition of a great number of other causes similarly situated, we deem it proper to express our views in writing.

The clause of the constitution creating this court provides, among other things (art. VI., sect. 12): —

"Appeals shall lie from the decisions of the St. Louis court of appeals to the supreme court, and writs of error may issue from the supreme court to said court in the following cases only: In all cases where the amount in dispute, exclusive of costs, exceeds the sum of $2,500; in all cases involving the construction of the constitution of the United States or of this state; in cases were the validity of a treaty, or statute of, or authority exercised under the United States is drawn in question, in cases involving the construction of the revenue laws of this state; or the title to any office under this state; in cases involving title to real estate; in cases where a county or other political subdivision of the state or any state officer is a party; in all cases of felony."

The amendment to the constitution "concerning the judicial department," adopted November 4, 1884 (Laws 1883, p. 215), provides, among other things: —

"Sect. 3. The general assembly shall have power by law to create one additional court of appeals, with a new

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district therefor, to change the limits of the appellate districts and the names of the courts of appeals, designating the districts by numbers or otherwise; to change the time of holding the terms of the said courts; to increase or diminish the pecuniary limit of the jurisdiction of the courts of appeals; to provide for the transfer of cases from one court of appeals to another court of appeals; to provide for the transfer of cases from a court of appeals to the supreme court, and to provide for the hearing and determination of such cases by the courts to which they may be transferred."

Purporting to act under these powers thus conferred upon it, the legislature enacted a law, which was approved March 4, 1885, containing the emergency clause, by force of which it went into effect at once, and which provides as follows: —

"Sect. 1. All cases which were pending in the St. Louis court of appeals on the first day of January, 1885, and which shall not have been disposed of at the time when this act shall go into effect, and which, by the terms of the constitutional amendment adopted on the fourth day of November, 1884, would come within the final appellate jurisdiction of the supreme court, shall be certified and transferred to the supreme court to be heard and determined by said court."

The constitutional amendment adopted on the 4th day of November, 1884, contains this provision: —

"Sect. 5. In all causes or proceedings reviewable by the supreme court, writs of error shall run from the supreme court directly to the circuit courts, and to courts having the jurisdiction pertaining to circuit courts and in all such causes or proceedings, appeals shall lie from such trial courts directly to the supreme court, and the supreme court shall have exclusive jurisdiction of such writs of error and appeals, and shall in all such cases exclusively exercise control over such trial courts."

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The cause we are now requested to hear was pending on appeal in this court on the first day of January, 1885, and the amount in dispute therein exceeds the sum of twenty-five hundred dollars. It was not disposed of on the fourth day of March, 1885, and the supreme court has final appellate jurisdiction therein, so that it falls clearly within the class of cases contemplated by the act of March 4, 1885, and is transferrable to the supreme court, according to the provisions of said act, unless by some reason, affecting the constitutional validity of the act itself, it is exempt from its operation.

This constitutional objection is suggested to us in two forms. First, that the act of March 4, 1885, is in excess of the powers conferred upon the legislature by the constitutional amendment of November 4, 1884, in this: That the third section of said amendment authorizing the legislature to provide by law for the transfer of cases from a court of appeals to the supreme court is not the grant of an unlimited power on the subject, but only a grant to provide for the transfer of cases which have been improvidently appealed to a court of appeals, or in regard to which the appellate jurisdiction of a court of appeals has been terminated by a change in the pecuniary limit of the jurisdiction of the court.

We have examined this objection and find it untenable. Not only would this construction be contrary to the plain letter of the constitutional provision, which contains no limitation, but would also be contrary to the object and spirit of the entire amendment.

It is apparent, from the tenor of the entire amendment, that it was the intention of the people, by its adoption to secure two results: First, the speediest practicable determination of all causes appealed, or to be appealed, by giving to the party aggrieved one appeal and no more for a review of errors of law. Second, so to regulate the jurisdiction of the various appellate courts of this state, as to

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enable them to dispose of the causes assigned to them respectively, in the most expeditious manner.

As these results could not practically and expeditiously be accomplished by having the jurisdiction of the various appellate courts determined from time to time in submitting and resubmitting the whole question to the people, it was deemed wise to entrust the legislature with that additional power, subject to the limitations imposed by the third section of the amendment and no others.

It is for that reason that the powers of establishing one additional court of appeals, and to increase or diminish the pecuniary limit of the jurisdiction of the court of appeals, as well as the power to transfer cases from one court of appeals to another court of appeals, and from a court of appeals to the supreme court, has been granted to the legislature. This gives to that body complete power to relieve either the supreme court or any of the courts of appeals by appropriate legislation whenever in its opinion the work of the court is such as to demand relief, in aid of the ultimate object sought to be attained, namely the speedy disposition of all appeals.

Nor can we see how the act of March 4, 1885, can be held amenable to the objection that it is opposed to the constitution of the United States, in violating the obligation of contracts. In the matter of the establishment, continuance, or discontinuance of its own courts, the people of every state are necessarily absolutely sovereign. If the people of this state would see fit to-day by constitutional amendment to discontinue every court within its border, except such as the national government is authorized to maintain within it, we can not see by what power vested in the national government they could be prevented from doing so. It is one of the elements of sovereign power, that it is limited only by the discretion of those who use it. This power the people in this instance have conferred upon the legislature limited by the provisions of section 3 of the

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constitutional amendment. The legislature has exercised it, within the limits thus established, and its discretionary exercise of the power is not subject to review by any court.

If any further argument were needed in support of the constitutionality of the law of March 4, 1885, we might add that the objection made to it in that regard, could be made with equal reason to the constitutional provision creating the Kansas City court of appeals. Both of these provided for the transfer of pending appeals from the supreme court to the courts thus established.

The supreme court in ordering such transfers to be made, necessarily decided that these provisions, almost identical with those of the law under consideration now, were not in conflict with any provision of the constitution of the United States.

Motion to hear the cause denied. All the judges concur.

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APPENDIX.

BEING A STATEMENT OF POINTS DECIDED IN CASES NOT REPORTED.

Affirmed *pro forma* on stipulation. — *City of St. Louis* v. *Skrainka*, No. 3028; *City of St. Louis* v. *Laclede Gas-Light Company*, No. 3070; *St. Louis Connecting Railway Company* v. *Missouri Pacific Railway Company*, No. 3121; *McPherson* v. *St. Louis, Iron Mountain & Southern Railroad Company*, No. 3087; *White* v. *Beard*, No. 3104; *Lampert* v. *Laclede Gas-Light Company*, No. 3195.

Affirmed for failure to file transcript. — *Montieth*, App., v. *Sellers*, Resp., No. 3212; *Smiley*, Resp., v. *Smiley*, App., No. 3213.

No error appearing on the record proper, the judgment will be affirmed, when no bill of exceptions is filed. — *The State* v. *Herzog*, 3068.

In criminal actions, where no statement and brief are filed, the court will, on appeal, render judgment upon the record. — *The State* v. *Zimmerman*, No. 3043.

(1.) An objection to the introduction in evidence of an ordinance on the ground that the subject is not clearly expressed in its title can not be made for the first time on appeal. (2.) Such an objection is waived if not made at the trial. (3.) The rule that negligence of the plaintiff which contributes directly to cause the injury complained of will prevent his recovery, is without exception or quali-

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fication. — *Dunkman*, Resp., v. *Wabash, St. Louis and Pacific Railway Company*, App. No. 2950. *Reversed.* H. S. Priest and Joseph Dickson, for the appellant. A. R. Taylor, for the respondent. Opinion by Thompson, J.

(1.) An interpleader can not sustain a claim to the property alleged to be his own by proving that he held it as trustee for another who is a party to the suit. (2.) In order to maintain his right he should have amended so as to have given the plaintiff notice that his claim was that of a factor with a mere right to sell for the owner and to retain his advances out of the proceeds. — *Wear*, App., v. *Sanger*, Resp. No. 2896. D. W. Wear and G. A. Madill, for the appellant. Noble & Orrick, for the respondent. Opinion by Thompson, J.

It having been agreed between the plaintiff and the attorney of some of the defendants that execution should not issue upon the judgment until a certain time, in disregard of which execution was issued and property sold thereunder, the defendants, relying on the agreement, having given no further attention to the matter, at once applied to have the sale set aside, which application was not opposed by the plaintiff, nor by the purchaser at the sale. *Held*, that it appearing that the sale might work a fraud upon the rights of the complainant it should be set aside, though opposed by other defendants. — *The State ex rel. Laughlin*, Resp., v. *Duncan*, App. No. 2941. *Reversed.* Taylor & Pollard, for the appellant; H. D. Laughlin, for the respondent. Opinion by Thompson, J.

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(1.) There can be no recovery upon a cause of action different from that sued upon. (2.) There can be no recovery upon a general allegation of negligence which gives no notice of facts, but which states only conclusions.

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(3.) The allegation being that the injury was occasioned by the falling of an eastern wall, and the proof being conflicting as to whether the plaintiff was injured by a brick from the eastern wall or from a fragment of a southern wall attached to the eastern wall, it is error to instruct the jury that there can be no recovery unless the brick which caused the injury fell from the eastern wall. (4.) To support a recovery there must be substantial evidence of every material fact necessary to a recovery, and inferences from facts to conclusions must be fair. (5.) Where there is evidence of a fact, it is immaterial, on appeal, that the witness thereto may seem to the appellate court to be unworthy of credit. (6.) Evidence of the condition of the wall, the falling of which caused the injury, four days before the accident is competent, where there is no evidence of a change of its condition in the meantime. (7.) The evidence being that at the time of his death the deceased was an active working man, earning a good living for himself and family, a verdict for $1,000, in an action by his wife for damages for his death, will not be reversed, because there was no precise evidence as to the money value of his life.—*Murdock*, Resp., v. *Brown*, App. No. 2874. *Affirmed*. H. Hitchcock, for the appellant; Kerr, Gibson & Kerr, for the respondent. Opinion by BAKEWELL, J.

(1.) The giving of erroneous and inconsistent instructions is not sufficient cause for the reversal of a judgment where it is plain that the jury could not have been misled by them to the prejudice of the appellant. (2.) A judgment will not be reversed on appeal because of a refusal to give an instruction, where all the instructions given are not set out in the record. (3.) Personal property purchased by one partner with his own funds to be used for partnership purposes, as between the partners remains the property of the purchaser, in the absence of any understanding to the contrary. (4.) If such property be destroyed in the use of

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the partnership and replaced by others, the latter belong to the partner who owned the original property. — *Kelly*, Resp., v. *Clancey*, App. No. 2983. *Affirmed.* W. C. Marshall, for the appellant; L. J. Smith, for the respondent. Opinion by LEWIS, P. J.

(1.) One who, with sufficient time to deliberate and to form a conscious purpose, and without reasonable cause to apprehend immediate personal harm to himself, uses a deadly weapon by which death is produced, with a manifest design to so use it, is guilty of murder in the first degree. (2.) A stone which, being thrown by a person, produced death may be a deadly weapon, and when it was introduced in evidence and the record does not disclose its weight or dimensions, an appellate court will not declare that it was not a deadly weapon. (3.) Testimony of a quarrel between the deceased and the defendant three days before the homicide could not tend to reduce the grade of crime, and is properly refused. (4.) Instructions as to grade of crime as to which there is no evidence are properly refused. — *The State*, Resp., v. *Wilson*, App. No. 3023. *Affirmed.* Thos. Morris, for the appellant; Thos. B. Harvey, for the respondent. Opinion by BAKEWELL, J.

(1.) An insolvent debtor may sell his property to a responsible third person for a reasonable price upon an agreement that the purchaser will apply the proceeds ratably to the payment of the vendor's creditors. (2.) A failure to instruct the jury as to questions upon which no instructions are asked is not ground for a reversal of the judgment. (3.) Notice of garnishment not being an issue in the case, it is competent for the plantiff to state that he stopped payment of his check because he was served with notice of garnishment, without introducing the notice. (4.) A wide latitude should be allowed in the introduction of evidence of the entire circumstances of the transaction in a case where fraud is alleged. (5.) A statement by the

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defendant as to his financial standing, made to a commercial agency, two and a half months prior to his assignment, is properly refused when offered as a part of the *res gestæ*, in an issue as to a fraudulent assignment. (6.) It is not error to reject testimony the relevancy of which is not shown by any explanation of the purpose for which it is offered.—*Young*, Resp., v. *Keller*, App. No. 2971. *Affirmed.* G. D. Rathburn and D. Goldsmith for the appellant; J. D. Shewatter, with Alex. Graves and W. C. Marshall, for the respondent. Opinion by THOMPSON, J.

An appellate court will not reverse a judgment because the trial court, sitting without a jury, finds that the evidence does not show that the contract sued on had been subsequently discharged.—*Edgar*, App., v. *Chicago, Burlington and Quincy Railroad Company*, Resp. No. 2985. *Affirmed.* C. M. Napton, for the appellant; Sweeney & Walker and G. Pollard, for the respondent. Opinion by THOMPSON, J.

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(1.) An attorney at law can not abandon his special contract, leave the employment of his client, and then recover on a *quantum meruit* for the services actually rendered. (2.) The question of what constitutes an abandonment of a contract is one of law for the court. (3.) That a senior counsel engaged in the trial of a cause designates a reputable attorney who had been engaged in former trials of the same cause to argue the motion for a new trial, does not warrant the junior counsel in abandoning the case contrary to his agreement to prosecute it to final determination.—*White*, Resp., v. *Wright*, App. No. 2973. *Reversed.* Pattison & Crane and M. L. Gray, for the appellant; W. C. Marshall, for the respondent. Opinion by THOMPSON, J.

A holding over by oral agreement after the expiration of a lease, is a holding under the terms of the lease, and is a

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waiver of the forfeiture of the improvements for a failure to remove them within the time prescribed by the terms of the lease. —*Brown*, Resp., v. *Wolff*, App. No. 2996. *Reversed*. Frank Hicks, for the appellant; Willi Brown, for the respondent. Opinion by THOMPSON, J.

(1.) The statute which makes six per cent the legal rate of interest in the absence of a written agreement has no application to a partnership agreement whereby one partner is allowed ten per cent for carrying securities purchased on joint account. (2.) In a suit for a partnership accounting, where the defendant admits an indebtedness, but denies the amount, and where the plaintiff makes proof as to some items and the defendant as to others, the court may, under the statute, apportion the costs. (3.) An appellate court will not review the trial court's discretion in dividing the costs between litigants, unless such discretionary power has been abused. (4.) On appeal by both parties from a judgment in which the costs are apportioned, where the judgment is affirmed, the costs of the appeal will be apportioned between the parties. *Campbell*, Plff., v. *Coquard*, Deft. No. 2863. *Affirmed*. Overall & Judson, for the plaintiff; H. A. & A. C. Clover, for the defendant. Opinion by THOMPSON, J.

(1.) A conviction of grand larceny under an indictment for burglary and larceny will not be reversed because the trial court gave an instruction as to petit larceny. (2.) A motion for a new trial on the ground of newly discovered evidence is properly denied if not supported by the defendant's affidavit, or the absence of such affidavit accounted for. (3.) The refusal of the defendant's counsel to summon certain witnesses for the defence is not ground for a new trial. *The State*, Resp., v. *Elliott*, App. No. 3037. *Affirmed*. Joseph Furling, for the appellant; T. B. Harvey, for the respondent. Opinion by BAKEWELL, J.

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(1.) The sudden snatching of property from the hand of the owner, without violence to him and without putting him in fear, is not robbery. (2.) That the owner is frightened on account of the theft is immaterial if the theft was not in consequence of the fright. (3.) The use of an improper pronoun to denote the sex of the person whose property was taken does not render the indictment bad after verdict where there is no question of surprise.—*The State*, Resp., v. *Willis, alias Wilcox*, App. No. 3038. *Affirmed.* Joseph Furling, for the appellant; T. B. Harvey, for the respondent. Opinion by BAKEWELL, J.

(1.) A husband whose wife, against his will, frequents houses of prostitution has good cause for refusing to support her. (2.) A conviction for wife abandonment can not be sustained under proof which shows the good habits and character of the accused, and that he refused to support his wife because of her notorious acts of unchastity since the marriage. (3.) In such a case it is immaterial that the defendant knew before marriage that the woman was unchaste.—*The State*, Resp., v. *Staffens*, App. No. 3069. *Reversed.* J. M. Holmes, for the appellant; J. R. Claiborne, for the respondent. Opinion by BAKEWELL, J.

(1.) In a civil case it is the duty of the complaining party to ask fuller instructions where those given are not full and explicit. (2.) The plaintiff is not required to prove facts which are explicitly admitted by the defendant's answer.— *Campbell*, Resp., v. *St. Louis, Iron Mountain and Southern Railway Company*, App. No. 3040. *Affirmed.* Bennett Pike, for the appellant; A. R. Taylor, for the respondent. Opinion by BAKEWELL, J.

The taking of a non-suit by the plaintiff will prevent a recovery in that action by the defendant on his counter-claim, although he have judgment by default.—*O'Malley*,

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Resp., v. *Judy*, App. No. 3046. *Affirmed.* McGinnis & Hart, for the appellant; E. J. O'Brien, for the respondent. Opinion by Bakewell, J.

Proof that the creditor mailed to the debtor an account does not, without more, prove an account stated.—*Rowland*, App., v. *Donovan*, Resp. No. 3058. *Affirmed.* Krum & Jonas and Douglas & Scudder, for the appellant; Broadhead & Haeussler, for the respondent. Opinion by Thompson, J.

(1.) The answer of a witness on cross-examination in a criminal case as to whether he had been convicted and punished for stealing is conclusive, and can not be disproved. When there is substantial evidence to support the defence of *alibi* the court should instruct the jury to acquit if they have a reasonable doubt whether the accused was present at the time and place.— *The State*, Resp., v. *Rocket*, App. No. 3042. *Reversed.* Gist Blair, for the appellant; T. B. Harvey for the respondent. Opinion by Lewis, P. J.

(1.) Proof that the fire arose from the act of a convict in the penitentiary who, while engaged with others in an attempt to escape, set fire to loose straw which communicated to the insured property, tends to show that the fire arose under a clause in the insurance policy which exempted the insurer from liability for damages from fire occasioned by "any person or persons engaged or concerned in any riot or in notorious resistance to the authority of magistrates or to any other lawful authority." (2.) In such an action an instruction that "notorious resistance to lawful authority," as used in the policy, means "a resistance of such a magnitude and accompanied with such a show of force as operates for the time being to disrupt prison discipline and free the inmates of such penitentiary, or large numbers of them,

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and does not mean a resistance to authority on the part of one person, or a few persons, that was readily overcome by the prison officials without loosing their control over the large majority of the inmates of the said prison," is misleading and erroneous.— *Strauss*, Resp., v. *Imperial Fire Insurance Company*, App. No. 3063. *Reversed.* Henry T. Kent, for the appellant; Charles Nagel, with whom is Henry Hitchcock, for the respondent. Opinion by THOMPSOM, J.

(1.) It is no defence to a proceeding to revive a judgment that a constable in whose hands was placed two executions issued upon two judgments in favor of the same plaintiff and against the same defendant, applied the proceeds of the execution here sought to be revived to the satisfaction of the other judgment. (2.) Under such a state of facts, it is immaterial that the judgment sought to be revived was against the defendant and his copartner, while the judgment which was satisfied was against the defendant alone.—*Gempp*, App., v. *Reiss*, Resp. No. 3019. *Reversed.* Broadhead & Haeussler and C. V. Scott, for the appellant; F. Gottschalk, for the respondent. Opinion by THOMPSON, J.

Under an indictment for assault "with intent to kill on purpose and of malice aforethought" under the statute (sect. 1262), a verdict of "guilty of assault with intent to kill" is sufficiently certain as a conviction under section 1263.—*The State*, Resp., v. *Berning*, App. No. 3039. *Affirmed.* Rombauer & Goldsmith, for the appellant; T. B. Harvey, for the respondent. Opinion by THOMPSON, J.

That a man summoned as one of the venire in the criminal court, said to a person in court at the time that "there is an honest living to be made in this country for every man, and all these thieving sons of bitches ought to be sent

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up," does not make him subject to challenge for cause, where it does not appear that his remarks were applied to the prisoner on trial.—*The State*, Resp., v. *Burns*, App. No. 3041. *Affirmed*. S. F. Andrews, for the appellant; T. B. Harvey, for the respondent. Opinion by THOMPSON, J.

A landlord who renews a letting from month to month of premises upon which is a nuisance, is liable for the damage occasioned to abutting property by such nuisance.—*Padberg*, App., v. *Kennerly*, Resp. No. 3047. *Reversed*. F. Gottschalk, for the appellant; Collins & Jamison, for the respondent. Opinion by THOMPSON, J.

Under a defence of *alibi* in a criminal action it is error to neglect to instruct the jury that if they have a reasonable doubt of the presence of the defendant at the time and place they should acquit.—*The State*, Resp., v. *Johnson*, App. No. 3049. *Reversed*. C. P. Johnson, for the appellant; T. B. Harvey, for the respondent. Opinion by THOMPSON, J.

(1.) An amendment by interlineation at the trial so as to state the cause of action in the name of the assignee of the original plaintiff is not ground for a continuance on the ground of surprise, the assignment being shown to have been in writing. (2.) A right of action by a principal against his agent for a violation of his instructions arises *ex contractu* and is assignable. (3.) The admission of evidence competent for one and incompetent for another purpose should be guarded by instructions. (4.) An instruction, if not objectionable as a whole, will not be refused because its first sentence does not embody its entire meaning.—*Peabody*, Resp., v. *Warner*, App. No. 3050. *Affirmed*. E. J. White, for the appellant; W. P. Bentley, for the respondent. Opinion by THOMPSON, J.

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A lot which abuts on an alley connecting with the newly constructed alley so as to give the owner an outlet through it, does not make the alleys the same so as to render the owner of the lot liable on a special tax-bill for the improvement. —*City of St. Louis*, App., v. *Juppier*, Resp. No. 3055. *Affirmed.* L. Bell and T. H. Culver, for the appellant; L. Gottschalk, for the respondent. Opinion by THOMPSON, J.

(1.) Declarations of a person that a chattel was his is incompetent in an issue as to ownership, when offered by a person who claims under the declarant. (2.) A statement to counsel by a trial judge, made in the presence of a jury, after the submission of the cause, that "there is no mistake about this date, July 16, being the correct date from which to compute interest if the verdict is for the plaintiff," is not ground for a reversal, where the jury were instructed to pay no attention to the remark. —*The State ex rel.*, Resp., v. *Groschke*, App. No. 3064. *Affirmed.* Leo Rassieur and Dexter Tiffany, for the appellant; Martin & Fauntleroy and W. C. Marshall, for the respondent. Opinion by THOMPSON, J. 16a 557 150m 468

(1.) Oral evidence is admissible to explain the meaning of the words "competent person," as used in a written contract to impart to a competent person the information necessary to enable him to operate a sugar factory. (2.) In an action on such a contract it is for the jury to say under the evidence whether such a competent person should be an expert, and whether a competent person within the meaning of the contract has been designated to receive the information bargained for. —*Tansill*, Resp., v. *Brinkman*, App. No. 3082. *Reversed.* Gilliam & Ferriss and W. C. Curtiss, for the appellant; W. B. Thompson, for the respondent. Opinion by THOMPSON, J.

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(1.) The evidence being that the defendant struck the deceased on the head with a heavy club, causing death within a few hours, an instruction that if the defendant in the heat of passion and without design to cause death, by "means and use of a dangerous weapon, to wit, a wooden club, feloniously killed the deceased, and that the killing was not justifiable or excusable, they will find him guilty of manslaughter in the third degree, is not objectionable as assuming that the club was a dangerous weapon. (2.) Evidence of an altercation between the defendant and deceased at another place and ten hours previously, in which the deceased struck the defendant, is inadmissible. — *The State*, Resp., v. *Grayor*, App. No. 3211. *Affirmed.* L. F. Ottofy and J. C. H. Stevenson, for the appellant; T. B. Harvey, for the respondent. Opinion by BAKEWELL, J.

(1.) Under an indictment for burglary and larceny the defendant may be acquitted of the former and convicted of the latter. (2.) The exclusion of merely cumulative evidence upon a point as to which there is no conflict of evidence, is not ground for the reversal of the judgment. (3.) It is not error to exclude evidence to show that the defendant, being out on bail, offered additional bail to avoid arrest. (4.) The uncontradicted testimony of both sides showing that the defendant was present at the time and place, it is not error to exclude evidence that the person of the same name was in jail at the time. (5.) Such evidence is not rendered competent by the fact that the prosecution introduces a record of a former conviction of a person of the same name. — *The State*, Resp., v. *McGuire*, App. No. 3214. *Affirmed.* T. B. Harvey, for the respondent. Opinion by BAKEWELL, J.

(1.) An injunction will not lie to restrain a sale of real estate upon an order of the probate court from which an appeal is pending. (2.) A personal obligation to pay an

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annuity secured by a deed of trust, in which, and in his last will, the obligor manifests an intention to make it an exclusive charge against his real estate, is, notwithstanding, a proper claim for allowance against the estate. — *Doellner*, App., v. *Schmieding*, Resp. No. 3018. *Affirmed.* J. M. Dickson, for the appellant; G. A. Finklenburg and Hugo Muench, for the respondent. Opinion by LEWIS, P. J.

(1.) An indictment signed by the assistant prosecuting attorney instead of the prosecuting attorney, is sufficient. (2.) An indictment framed in accordance with the terms of the statute will support a conviction. — *The State*, Resp., v. *Higgins*, App. No. 3034. *Affirmed.* R. W. Goode, for the appellant; T. B. Harvey, for the respondent. Opinion by BAKEWELL, J.

(1.) Under an indictment for burglary and larceny it is not essential to a conviction that the jury should believe that the defendant actually entered the house. (2.) It is sufficient if the jury believe that two men were accomplices, and that, acting together for a common purpose, one of them, after breaking, entered the house with intent to steal and did steal, both being present. — *The State*, Resp., v. *Staehlin*, App. No. 3210. *Affirmed.* T. B. Harvey, for the respondent. Opinion by BAKEWELL, J.

(1.) Under a grant of land by the United States to a person named, "or his legal representative," the question as to who are his representatives must be determined under the law of the state wherein the property is situated. (2.) Where adverse possession operates a transfer of title, such possession is as effectual to create a legal representative as is a transfer by deed. (3.) Giving effect to a transfer by adverse possession does not defeat the original grant from the United States, but aids it by ascertaining who is the grantee. — *Cummings*, App., v. *Powell*, Resp.

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No. 3035. *Affirmed.* D. T. Jewett, for the appellant; Dryden & Dryden, for the respondent. Opinion by LEWIS, P. J.

(1.) Jurors summoned on a special jury in a criminal case need not be selected by the sheriff of St. Louis from names furnished him by the jury commissioner. (2.) An indictment may be signed by the assistant circuit attorney instead of the circuit attorney. (3.) It is competent for the court to instruct the jury that there is no evidence of any provocation or cause of provocation which will authorize them in finding want of deliberation. (4.) Evidence merely that the defendant was subject to epileptic fits will not justify the giving of an instruction that if the jury believe the defendant's faculties were so impaired that she could not recognize the deceased, a police officer in uniform, they should acquit. (5.) The test of insanity in criminal cases is whether the defendant at the time was capable of distinguishing right from wrong with respect to the act done. — *The State*, Resp., v. *Hayes* App., No. 3216. *Affirmed.* R. Graham Frost, for the appellant; T. B. Harvey, for the respondent. Opinion by THOMPSON, J.

A shipping ticket is not a warehouse receipt, and is non-negotiable. Reversed, in accordance with the decision in *Union Savings Association* v. *St. Louis Grain Elevator Company*, 81 Mo. 341. — *Union Savings Association*, App., v. *St. Louis Grain Elevator Company*, Resp. No. 3084. *Reversed.* Broadhead & Hauessler, for the appellant; C. A. Pearce, for the respondent. Opinion by THOMPSON, J.

Where a good part of goods sold are replevied by the vendor, on the ground that the vendee purchased them, intending not to pay for them, a subsequent general assignment by the vendee and a presentation and disallowance of a claim

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for the balance of the debt before the assignee, is not a bar to a recovery in the replevin suit. — *Florence Soap Company*, App., v. *Jacobus*, Resp. No. 3085. *Reversed.* A. Arnstein, for the appellant; A. Binswanger, for the respondent. Opinion by THOMPSON, J.

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(1.) A car conductor who, in leaving a part of his wages with the secretary of a corporation, believing, and having reason to believe, that he is depositing it with the corporation, may recover from the corporation the money so deposited. (2.) That the conductor, believing that he is taking the notes of the corporation for the money so deposited, being unable to read or write, takes the note of the secretary and treasurer of the corporation, does not release the corporation. — *Leary*, Resp., v. *People's Railway Company*, App. No. 3106. *Reversed nisi.* Given Campbell, for the appellant; McKeighan & Jones and E. J. O'Brien, for the respondent. Opinion by THOMPSON, J.

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1. BILLS OF LADING — CONTRACTS. — Seventy thousand pounds of corn in bulk is not a "package" within the meaning of a printed clause in a bill of lading restricting the carrier's liability for the loss of packages. *Rosenstein* v. *Missouri Pacific Railway Company*, 225.

2. —— DAMAGES — TORTS — ACTIONS EX DELICTO.— An action against a common carrier for damages to goods while in transit, in which no contract of affreightment is set up in the petition, is an action *ex delicto*. *Hell* v. *St. Louis, Iron Mountain & Southern Railway Company*, 363.

3. —— PRACTICE — TAKING CASE FROM THE JURY.— Although in such action it is shown on the trial that the carrier issued to the shipper a bill of lading embodying a limitation of the carrier's common-law liability, that does not authorize the court in taking the case from the jury. *Id.*

4. —— LIMITATION OF LIABILITY BY CONTRACT.— The statutory liability of a common carrier for damages to goods by the negligence of connecting carriers, can not be evaded by issuing a bill of lading expressing an exemption from such liability. *Id.*

5. —— MEASURE OF DAMAGES.—A stipulation in a bill of lading that the cost of the property at the point of shipment shall govern in the case of loss, does not refer to damage or deterioration while in transit. *Id.*

6. ——The measure of damages for injury to goods while in transit is the difference between the reasonable market value of the goods at the point of destination at the date when they should have arrived and their real value in their damaged condition. *Id.*

7. —— BURDEN OF PROOF. — In an action against a common carrier on his common-law liability for damages to goods in transit, where the carrier sets up a special contract limiting his liability, and proves that the loss occurred by reason of a peril excepted in such contract, the burden of proving the supervening negligence of the carrier, rests with the plaintiff. *Id.*

COMPOSITION. See BAR TO ACTIONS, 2, 3.

CONSTITUTIONAL LAW. See HABEAS CORPUS, 1; LICENSES.

1. HIGHWAYS — STREETS — PRIVILEGES — MONOPOLY. — The state has proprietary control over highways, and a grant by it of a part of

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CONSTITUTIONAL LAW — Continued.

that control does not violate the constitutional provision against granting exclusive privileges. *St. Louis Gas-Light Company* v. *St. Louis Gas, Fuel and Power Company*, 52.

2. —— The state may make such a grant with terms and conditions which give it the force of an inviolable contract which can not be affected by subsequent legislation. *Id.*

3. —— The state constitution of 1820, article 13, section 20, by its terms, prohibits the granting of any exclusive privilege, hereditary or otherwise. *Id.*

4. —— The state can not confer upon any individual or corporation the sole and exclusive privilege of making or vending any commodity. *Id.*

5. —— A grant of such a privilege is a monopoly prohibited by common law, and by the state constitution of 1820. *Id.*

6. —— So much of the charter of the St. Louis Gas-Light Company, as purports to grant an exclusive privilege of making and vending gas is void. *Id.*

7. —— So much of that charter, as grants an exclusive right to use the streets for laying gas pipes, is valid, and, for the time being, is enforceable. *Id.*

8. CHARTER — ORDINANCES. — The municipal assembly of the city of St. Louis has no power, at any special session thereof, to pass an ordinance as to a matter in no way alluded to in the opening message of the mayor. *City of St Louis* v. *Withaus*, 247.

9. —— Statements in the opening message that the mayor would propose other legislation, and subsequent messages proposing other legislation not specifically alluded to in the first message, will not authorize legislation on such subjects. *Id.*

10. FALSE PRETENCES. — The statutory provision as to obtaining money under false pretences is valid. *The State* v. *McChesney*, 259.

11. RAILROADS — LIENS. — The railroad lien act of March 21, 1873, did not go into effect until ninety days after its passage. *Andrews* v. *St. Louis Tunnel Railroad Company*, 299.

12. —— PRIORITY OF LIENS — FORECLOSURE OF DEED OF TRUST. — The lien of a deed of trust executed prior to the passage of the act of March 21, 1873, is superior to that of a lien for materials furnished for the road after the passage of the act, but prior to the expiration of the ninety days, though a portion of the purchase price of the secured bonds was not paid until after the making of the contract for the materials for which a lien is asked. *Id.*

13. —— COURTS. — In the matter of the establishment, continuance, or discontinuance of its own courts each state is sovereign, and in

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CONSTITUTIONAL LAW — Continued.

establishing or discontinuing courts, a state violates no provision of the constitution of the United States. *The State ex rel* v. *Slevin*, 541.

14. —— The act of March 4, 1885, does not confer any power in excess of, and does not conflict with, the constitutional amendment of November 4, 1884. *Id.*

CONTEMPT. See APPEALS 1.

1. —— ATTACHMENT — NOTICE — PRACTICE. — The court may issue an attachment for a person accused of contempt committed out of the presence of the court, without first making a preliminary order to show cause. *Ex parte Mason*, 41.

2. —— An attachment which sets forth specifically the act charged as contempt of court, is such notice as will satisfy the statute. *Id.*

3. —— In a proceeding by *habeas corpus*, it will not be presumed that the person accused of contempt will be punished without a fair hearing. *Id.*

4. —— An attachment for contempt being regularly issued by the circuit court of one county against the sheriff of another county for refusing to execute the process of the court in his bailiwick, the prisoner will not be discharged under a writ of *habeas corpus*. *Id.*

4. —— DISOBEDIENCE. — It is contempt of court to refuse to obey any order of the court which it has jurisdiction to make, irrespective of whether such order is erroneous. *The State ex rel.* v. *Horner*, 191.

6. —— Every court of record has the power to punish, by fine and imprisonment, wilful disobedience of any process issued, or order made, by it. *Id.*

CONTINUANCE.

1. AMENDMENT. — An amendment by interlineation at the trial so as to state the cause of action in the name of the assignee of the original plaintiff is not ground for a continuance on the ground of surprise, the assignment being shown to have been in writing. *Peabody* v. *Warner*, 556.

CONTRACTS. See PRACTICE, 1, 2; SALES; SPECIFIC PERFORMANCE; ATTORNEY AND CLIENT EQUITY, 7.

1. CONSIDERATION. — A promise conditioned upon a release to the promisor of an interest asserted by the promisee, but not conceded by the promisor, is supported by a sufficient consideration. *Vallé* v. *Picton*, 178.

2. —— A promise conditioned upon the conveyance to the promisor of a possible interest which he believes the promisee has, but which

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CONTRACTS — Continued.

the latter does not claim is supported by a sufficient consideration. *Id.*

3. CARRIERS — BILLS OF LADING. — Seventy thousand pounds of corn in bulk is not a "package" within the meaning of a printed clause in a bill of lading restricting the carrier's liability for the loss of packages. *Rosenstein* v. *Missouri Pacific Railway Company*, 225.

4. MUTUALITY ESSENTIAL, BUT MAY BE IMPLIED. — Although a contract in express terms is obligatory on one party only, yet if it appears therefrom that the consideration upon which one party assumed an express obligation, was a corresponding obligation of the other party, such obligation of the latter will be implied. *Jones* v. *Durgin*, 370.

5. WANT OF CONSIDERATION. — When in a continuing contract the obligation to be implied is so vague and indefinite as to be incapable of enforcement, the express obligation fails for want of consideration. *Id.*

6. CONSTRUCTION OF — RESERVATIONS. — Exceptions or reservations in an instrument of writing will be construed most strongly against the person making them, where, with equal reason, they admit of two constructions. *McManus* v. *Gregory*, 375.

7. INTERPRETATION — ARCHITECTS. — Under a written proposition made to certain architects for plans and specifications of a certain proposed building, under the terms of which proposition each architect should receive the sum of five hundred dollars for his plans, irrespective of relative merit, and which contained the further clause that: "The architect who is successful shall not receive five hundred dollars, but he shall be engaged as architect and superintendent, and shall be paid," etc., the architect whose plans are accepted as the most meritorious of all, has a right of action for a refusal to employ him as architect and superintendent. *Walsh* v. *St. Louis Exposition*, 502.

8. EVIDENCE. — A written proposition from one person is not admissible to prove a contract unless it has been accepted by the other person. *Taylor* v. *Fox*, 527.

9. ESTOPPEL. — A person who is *sui juris* will not, in the absence of fraud, be permitted to avoid his written obligation by showing that he did not read it nor hear it read. *Id.*

10. MERGER. — A written contract which embraces all the items of a proposition and adds others, merges the proposition in the contract. *Id.*

11. OPTION — WAGERS. — Contracts for the sale and purchase of commodities with an intention not to deliver the same, but to merely

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CONTRACTS — Continued.

settle the differences in the fluctuations in the market price, are void. *Van Blarcom* v. *Donovan*, 535.

12. —— EVIDENCE — PRACTICE. — The evidence as to the legality of the transactions in controversy in this case is held to have been sufficient to take the case to the jury. *Id.*

13. ABANDONMENT. — The question as to what constitutes an abandonment of a contract is one of law for the court. *White* v. *Wright*, 551.

CORPORATIONS.

1. FRAUDULENT CONVEYANCES — DIRECTORS — TRUST RELATIONS. — The directors of a business corporation may, by their votes, authorize the execution of a deed which has the effect of giving them a preference, as *bona fide* creditors, over other creditors of the corporation. *Forster* v. *Mullanphy Planing Mill Company*, 150.

2. —— A deed of its assets, by a corporation, to one of its directors to secure a loan made by him to it when the latter was in embarrassed circumstances, is not necessarily void. *Id.*

COSTS.

1. PRACTICE — DISCRETION. — An appellate court will not review the trial court's discretion in dividing the costs between litigants, unless such discretionary power has been abused. *Campbell* v. *Coquard*, 552.

2. —— In a suit for a partnership accounting, where the defendant admits an indebtedness, but denies the amount, and where the plaintiff makes proof as to some items and the defendant as to others, the court may, under the statute, apportion the costs. *Id.*

3. —— On appeal by both parties from a judgment in which the costs are apportioned, where the judgment is affirmed, the costs of the appeal will be apportioned between the parties. *Id.*

COUNTER-CLAIM. See PRACTICE, TRIAL, 13.

CRIMINAL LAW. NEW TRIAL, 1; VENUE, 1; PRACTICE, 3; NEW TRIAL, 3, 4; HUSBAND AND WIFE, 4, 5; JURORS, 3; EVIDENCE, 14, 19; INDICTMENT.

1. ASSAULT — INTENT — INSTRUCTIONS. — In a prosecution for assault, where there is evidence that the assault was with the fist, and under which the accused might be convicted of a common assault, it is error to neglect to instruct the jury that if they believe there was no intent to kill they may acquit of the felony. *The State* v. *Kelly*, 213.

2. —— ALIBI. — In such an action, where there is substantial evidence to support the defence of *alibi*, it is error to neglect to instruct the

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CRIMINAL LAW — Continued.

jury with reference to this defence. *Id.; The State* v. *Rocket*, 554; *The State* v. *Johnson*, 556.

3. INDICTMENT — FALSE PRETENCES. — An indictment which charges that the defendant, by a trick, attempted to obtain a large sum of money, "from certain persons, firms, and corporations then and there composing a voluntary association called the Brewers' Association of St. Louis, a more particular description of which is to the jurors unknown," sufficiently identifies the parties and the transaction to satisfy the rule of pleading. *The State* v. *McChesney*, 259.

4. —— PRACTICE — WITNESSES. — That one of the two prosecuting witnesses named on the back of the indictment has no real existence does not invalidate the indictment. *Id.*

5. BURGLARY. — One who enters a house through an open window or door is not guilty of burglary. *The State* v. *Kennedy*, 287.

6. —— PRACTICE. — Appellate courts will reverse a criminal conviction which is without substantial evidence to support it. *Id.*

7. INDICTMENT — ARSON. — An indictment which charges that the defendant "did, unlawfully, etc., set fire to and burn a certain dwelling-house situated in the city of St. Louis aforesaid," is too indefinite in its description of the house to support a conviction. *The State* v. *Wacker*, 417.

8. —— PRACTICE. — A judgment in a criminal case having been reversed because of the insufficiency of the indictment, the defendant will not be discharged, but the cause will be remanded, where "there is reasonable ground to believe that the defendant can be convicted of an offence if properly charged." *Id.*

9. PETIT LARCENY — MISDEMEANOR — FELONY. — The second offence of petit larceny is a felony. *The State* v. *Lehr*, 491.

10. —— APPELLATE JURISDICTION. — The supreme court alone has appellate jurisdiction of felonies. *Id.*

11. —— APPEALS. — An appeal from a conviction of a felony, taken to the St. Louis Court of Appeals after November 4, 1884, will be dismissed. *Id.*

12. MURDER. — One who, with sufficient time to deliberate and to form a conscious purpose, and without reasonable cause to apprehend immediate personal harm to himself, uses a deadly weapon by which death is produced, with a manifest design to so use it, is guilty of murder in the first degree. *The State* v. *Wilson*, 550.

13. DEADLY WEAPON. — A stone which, being thrown by a person, produced death, may be a deadly weapon, and when it is introduced in evidence and the record does not disclose its weight or dimensions, an appellate court will not declare that it was not a deadly weapon. *Id.*

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CRIMINAL LAW — Continued.

14. EVIDENCE. — Testimony of a quarrel between the deceased and the defendant three days before the homicide could not tend to reduce the grade of crime, and is properly refused. *Id.*

15. INSTRUCTIONS. — Instructions as to grades of crime as to which there is no evidence are properly refused. *Id.*

16. —— A conviction of grand larceny under an indictment for burglary and larceny will not be reversed because the trial court gave an instruction as to petit larceny. *The State* v. *Elliott*, 552.

17. LARCENY — ROBBERY. — The sudden snatching of property from the hand of the owner, without violence to him and without putting him in fear, is not robbery. *The State* v. *Willis*, 553.

18. —— That the owner is frightened on account of the theft is immaterial if the theft was not in consequence of the fright. *Id.*

19. —— INDICTMENT. — The use of an improper pronoun to denote the sex of the person whose property was taken does not render the indictment bad after verdict where there is no question of surprise. *Id.*

20. ASSAULT — INDICTMENT. — Under an indictment for assault "with intent to kill on purpose and of malice aforethought" under the statute (sect. 1262), a verdict of "guilty of assault with intent to kill" is sufficiently certain as a conviction under section 1263. *The State* v. *Berning*, 555.

21. MURDER — INSTRUCTIONS. — The evidence being that the defendant struck the deceased on the head with a heavy club, causing death within a few hours, an instruction that if the defendant in the heat of passion and without design to cause death, by "means and use of a dangerous weapon, to wit, a wooden club, feloniously killed the deceased, and that the killing was not justifiable or excusable, they will find him guilty of manslaughter in the third degree," is not objectionable as assuming that the club was a dangerous weapon. *The State* v. *Grayor*, 558.

22. BURGLARY — LARCENY. — Under an indictment for burglary and larceny the defendant may be convicted of the former and acquitted of the latter. *The State* v. *McGuire*, 558.

23. —— Under an indictment for burglary and larceny it is not essential to conviction that the jury should believe that the defendant actually entered the house. *The State* v. *Staehlin*, 559.

24. —— It is sufficient if the jury believe that two men were accomplices, and that, acting together for a common purpose, one of them, after breaking, entered the house with intent to steal and did steal, both being present. *Id.*

25. INSTRUCTIONS. — It is competent for the court to instruct the jury

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CRIMINAL LAW — Continued.

that there is no evidence of any provocation or cause of provocation which will authorize them in finding want of deliberation. *The State* v. *Hayes*, 560.

26. INSANITY — EVIDENCE. — Evidence merely that the defendant was subject to epileptic fits will not justify the giving of an instruction that if the jury believe the defendant's faculties were so impaired that she could not recognize the deceased, a police officer in uniform, they should acquit. *Id.*

27. —— The test of insanity in criminal cases is whether the defendant at the time was capable of distinguishing right from wrong with respect of the act done. *Id.*

CUSTODIA LEGIS. See GARNISHMENT, 1.

DAMAGES. See COMMON CARRIERS, 5, 6.

1. PLEADING — RAILROADS — STOCK. — A petition in an action under section 809 of the Revised Statutes against a railroad company for killing stock, which does not aver that the killing did not occur within an incorporated town, is not sufficient. *Holland* v. *West End Narrow Gauge Railway Company*, 172.

2. —— REPEAL OF STATUTES. — The stock law (Rev. Stats., p. 1550) does not repeal the statute which requires railroad companies to fence their roads. *Id.*

3. —— TRESPASS — FENCES. — The trespass, if any, of cattle is not a defence to an action for their death against a railroad company where they enter upon the road from the owner's premises by reason of the company's failure to fence its road. *Id.*

4. INSTRUCTIONS. — A judgment will not be reversed because of the giving of an erroneous instruction as to the measure of damages, where there is no conflict in the testimony as to the elements of damages, and the amount of damages is a mere matter of calculation as to which the jury have not erred. *Heil* v. *St. Louis, Iron Mountain and Southern Railway Company*, 363.

5. ADJOINING PROPRIETORS — SURFACE WATER — COMMON-LAW RULES. — The rights of land-owners with respect of the flow of surface water over their lands is governed by the rules of the common law. *Hoester* v. *Hemsath*, 485.

6. —— A land-owner may rightfully so ditch his own land as to collect, and cause to flow into a pond in a body, surface water which formerly flowed into the pond through natural channels. *Id.*

7. —— EQUITY. — Where the evidence leads to the conclusion that an overflow of the pond is caused by detrition rather than by an increased flow of water, equity will not relieve the owner of the overflowed land. *Id.*

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DE FACTO OFFICERS. See OFFICERS, 4, 5.

DESCENTS AND DISTRIBUTION. See EQUITY, 5.

DIVORCE.

1. DESERTION — PRESUMPTIONS. — A separation caused by indignities of the husband to the wife, and which he does not seek to terminate by making reparation or otherwise, is presumed to have been, and to continue, with his consent. *Dwyer* v. *Dwyer*, 422.

2. —— A husband who is guilty of ill-treatment of his wife which causes her to leave him, but which is not such as renders her condition "intolerable," and who, though living at the same town, makes no reparation, is not an "injured party" within the meaning of the divorce statute. *Id.*

3. —— CROSS-BILL. — The wife in such a case can not maintain a cross-bill against her husband for refusing to provide for her. *Id.*

4. —— PER ROMBAUER, J. — A husband or wife does not cease to be the "injured party" by conduct which is not such as to entitle the other party to a divorce. *Id.*

EJECTMENT. See HOMESTEAD, 3.

1. SUIT TO QUIET TITLE — BAR TO ACTIONS. — A suit to quiet title, subsequently dismissed on the pleadings, by A against B, in which B alleges title in C is not a bar to a proceeding in ejectment. *Williams* v. *Newcomb*, 185.

2. —— UNLAWFUL DETAINER — EVIDENCE — RES JUDICATA. — A former recovery in unlawful detainer by the defendant in ejectment against the plaintiff, is inadmissible to support a plea of *res judicata* as to the issue in ejectment. *Id.*

EQUITY. See HUSBAND AND WIFE, 1, 3; PARTNERSHIP, 1; TRUSTEES, 1; SPECIFIC PERFORMANCE; DAMAGES, 7; INJUNCTION.

1. INFANTS — PARTIES. — Interests of minor children in property, the sale of which is sought to be set aside as fraudulent, can not be effected by a decree in a suit to which they are not parties. *Burns* v. *Bangert*, 22.

2. —— PRACTICE. — If minor children are not necessary parties to an action on the plaintiff's theory of the case, his bill should not be dismissed because he has not made them parties. *Id.*

3. ADOPTION — PARENT AND CHILD — ORAL CONTRACTS. — After the the death of a husband and wife, equity will not give effect to an oral promise by them to adopt the plaintiff as their child. *Sharkey* v. *McDermott*, 80.

4. —— MARRIED WOMEN. — After the death of a married woman, equity will not give effect to her oral promise, made during coverture, to adopt a child *Id.*

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EQUITY — Continued.

5. —— An adopted child of the husband does not by reason of such adoption become the heir of the wife. *Id.*

6. —— An oral contract which will operate after death as a disposition of the estate must be such as was mutually enforcéable during the lives or the parties. *Id.*

7. —— The performance of such a contract by the claimant must have been in sole consideration of the contract and have been referable to no other consideration. *Id.*

8. INJUNCTION. — If an action at law gives an unfair advantage to the adverse party, equity will interfere and grant relief. *Lindley* v. *Russell*, 217.

9. —— The plaintiff being entitled to a cancellation of an instrument of writing, equity will interfere to restrain a proceeding in replevin for its possession, where its possession by the defendant would work a fraud on the plaintiff or those for whom he is acting as trustee. *Id.*

10. DEEDS OF TRUST — PAYMENTS TO PRESERVE PROPERTY — LIENS.— A lien for insurance premiums paid by one bondholder to preserve the mortgaged property may be declared and enforced, though the holders of other bonds secured by the deed of trust had no actual notice of such payment. *McLean* v. *Burr*, 240.

11. —— FORECLOSURE. — Under what circumstances the foreclosure of a deed of trust leaves nothing for a court of equity to adjust as between the respective lien claimants. *Andrews* v. *St. Louis Tunnel Railroad Company*, 299.

12. JUDICIAL SALES. — Under what circumstances a sale under execution may be set aside. *The State ex rel.* v. *Duncan*, 548.

ESTOPPEL. See MECHANIC'S LIENS, 5; CONTRACTS, 9.

EVIDENCE. See HOMESTEAD, 3, 4; EXECUTIONS, 2; JURORS; REPLEVIN; 7, 8; CONTRACTS, 8; TAXES, 3, 4; NEGLIGENCE, 7; CRIMINAL LAW, 14; INSURANCE, 1.

1. RECORD — JUDGE'S MEMORANDUM. — The judge's memorandum on his trial docket is not a part of the record, and can not, at a subsequent term, be used to contradict the record entry of the judgment, which is conclusive. *Henley* v. *Kinley*, 176.

2. EJECTMENT — UNLAWFUL DETAINER — EVIDENCE — RES JUDICATA. — A former recovery in unlawful detainer by the defendant in ejectment against the plaintiff, is inadmissible to support a plea of *res judicata* as to the issue in ejectment. *Williams* v. *Newcomb*, 185.

3. ATTORNEY AND CLIENT — PRIVILEGED COMMUNICATIONS. — Statements made in a consultation with counsel while seeking legal advice as to a prospective violation of the law, are not privileged

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EVIDENCE — Continued.

and the attorney may be compelled to testify with reference thereto. *The State* v. *McChesney*, 259.

4. —— CUSTOM OF TRADE — KNOWLEDGE OR NOTICE. — Evidence of a custom of trade set up to modify a written contract is inadmissible unless it be first shown that it was either known to the party sought to be charged or that it was so notorious that such knowledge may be presumed. *Park* v. *Viernow*, 383.

5. SECONDARY EVIDENCE — NOTICE TO PRODUCE PAPERS. — Notice given at the adjournment of court to produce papers at the continuation of the trial next morning may be such a reasonable notice as will admit secondary evidence of the contents of the paper. *Id.*

6. PRACTICE — The introduction of evidence which is not prejudicial to the appellant is not ground for a reversal. *Stern Auction Company* v. *Mason*, 478.

7. —— AGENT'S SUBSEQUENT DECLARATIONS — NEGLIGENCE. — In an action for damages for personal injuries occasioned by the negligence of a railroad company, it is error to permit a witness to testify that, a few days after the injury, the conductor who had charge of the train at the time of the injury, said that the bell was not rung, and that the train was running at an excessive rate of speed. *Wengler* v. *Missouri Pacific Railroad Company*, 493.

8. INSTRUCTIONS — FALSE TESTIMONY. — An instruction that if the jury believe that any witness has testified falsely to any material fact they may disregard his entire testimony, and which omits the elements of knowledge and willfulness, is erroneous. *Evans* v. *St Louis, Iron Mountain and Southern Railway Company*, 522; *Fath* v. *Hake*, 587.

9. RES GESTÆ — ASSIGNMENT. — A statement by the defendant as to his financial standing, made to a commercial agency, two and a half months prior to his assignment, is properly refused when offered as a part of the *res gestæ*, in an issue as to a fraudulent assignment. *Young* v. *Kellar*, 551.

10. FRAUD. — A wide latitude should be allowed in the introduction of evidence of the entire circumstances of the transaction in a case where fraud is alleged.

11. RELEVANCY. — It is not error to reject testimony the relevancy of which is not shown by any explanation of the purpose for which it is offered. *Id.*

12. GARNISHMENT. — Notice of garnishment not being an issue in the case, it is competent for the plaintiff to state that he stopped payment of his check because he was served with notice of garnishment, without introducing the notice. *Id.*

13. ACCOUNT STATED. — Proof that the creditor mailed to the debtor

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EVIDENCE — Continued.

an account does not, without more, prove an account stated. *Rowland* v. *Donovan*, 554.

14. CROSS-EXAMINATION. — The answer of a witness on cross-examination in a criminal case as to whether he had been convicted and punished for stealing is conclusive, and can not be disproved. *The State* v. *Rocket*, 554.

15. PRACTICE — INSTRUCTIONS. — The admission of evidence competent for one, and incompetent for another; purpose, should be guarded by instructions. *Peabody v. Warner*, 556.

16. TITLE — CHATTELS. — Declarations of a person that a chattel was his is incompetent in an issue as to ownership, when offered by a person who claims under the declarant. *The State ex rel* v. *Groschke*, 557.

17. ORAL — CONTRACTS. — Oral evidence is admissible to explain the meaning of the words "competent person," as used in a written contract to impart to a competent person the information necessary to enable him to operate a sugar factory. *Tansill* v. *Brinkman*, 557.

18. —— PRACTICE — In an action on such a contract it is for the jury to say under the evidence whether such "competent person" should be an expert, and whether a competent person within the meaning of the contract had been designated to receive the information bargained for. *Id.*

19. CRIMINAL LAW. — Evidence of an altercation between the defendant and the deceased at another place and ten hours previously, in which the deceased struck the defendant is inadmissible. *The State* v. *Grayor*, 558.

20. —— CUMULATIVE. — The exclusion of merely cumulative evidence upon a point as to which there is no conflict of evidence is not ground for the reversal of the judgment. *The State* v. *McGuire*, 558.

21. —— It is not error to exclude evidence to show that the defendant, being out on bail, offered additional bail to avoid arrest. *Id.*

22. —— ALIBI — The uncontradicted testimony of both sides showing that the defendant was present at the time and place, it is not error to exclude evidence that the person of the same name was in jail at the time. *Id.*

23. —— Such evidence is not rendered competent by the fact that the prosecution introduces a record of a former conviction of a person of the same name. *Id.*

EXECUTION. See REPLEVIN. - HOMESTEAD, 1.

1. —— JUSTICES. — An execution issued by the circuit court on a justice's judgment will not be quashed because the justice's trans-

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EXECUTION — Continued.

script does not show the manner of service upon the defendant, where he appeared and defended the action. *Bauer* v. *Miller*, 252.

2. —— EVIDENCE. — A certificate of the justice showing the issuance of execution and a return of *nulla bona*, though not a part of the transcript, if admitted without objection, is *prima facie* evidence which justifies the issuance of execution on the transcript. *Id.*

EXECUTORS AND ADMINISTRATORS. See ADMINISTRATION

EXEMPTIONS. See TAXES.

FACTOR AND BROKER.

1. —— INTERPLEAS — EVIDENCE. — An interpleader can not sustain a claim to the property alleged to be his own by proving that he held it as trustee for another who is a party to the suit. *Wear* v. *Sanger*, 548.

2. —— In order to maintain his right he should have amended so as to have given the plaintiff notice that his claim was that of a factor with a mere right to sell for the owner and to retain his advances out of the proceeds. *Id.*

FRAUDULENT CONVEYANCES. See CORPORATIONS, 1; ATTACHMENT, 11.

1. —— ATTACHMENT. — A conveyance which will authorize an attachment on the ground that it is in fraud of creditors must be absolutely void as to creditors, so as to create a resulting trust in their favor and constitute the grantee a trustee for their benefit. *Forster* v. *Mullanphy Planing Mill Company*, 150.

2. —— INADEQUACY OF PRICE — PRACTICE. — In cases of conveyances affecting creditors, inadequacy of price, coupled with circumstances of secrecy and concealment, is sufficient to take the case to the jury. *Stern Auction Company* v. *Mason*, 473.

3. GIFTS. — An insolvent person may make a voluntary transfer of property to his wife which will be good as against subsequent creditors, unless it is made with the intent to hinder, delay, or defraud them. *Boatmen's Savings Bank* v. *Overall*, 510.

4. INSOLVENCY. — An insolvent debtor may sell his property to a responsible third person for a reasonable price upon an agreement that the purchaser will apply the proceeds ratably to the payment of the vendor's creditors. *Young* v. *Keller*, 551.

5. EVIDENCE — RES GESTÆ. — A statement by the defendant as to his financial standing, made to a commercial agency, two and half months prior to his assignment, is properly refused when offered as a part of the *res gestæ*, in an issue as to a fraudulent assignment. *Id.*

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GARNISHMENT.

1. OFFICERS — CUSTODIA LEGIS.— Money deposited with the sheriff by the defendant in replevin to enable him to retain the property, is not in *custodia legis*, and is subject to garnishment. *Johnson* v. *Mason*, 271.

HABEAS CORPUS. See CONTEMPT, 3, 4.

1. CONSTITUTIONAL LAW — ORDINANCES — PRACTICE.— Under an application for the discharge of a prisoner, under a writ of *habeas corpus*, on the sole ground of the unconstitutionality of the ordinance for a violation of which he is held for trial, an appellate court will not pass upon the validity of the ordinance, but will remand the prisoner. *Ex parte Bowler*, 14.

2. JURISDICTION — Inquiry under a writ of *habeas corpus* is generally limited to the question as to whether the process under which the prisoner is held was issued by a court of competent jurisdiction and in a case allowed by law. *Ex parte Mason*, 41

3. INFANTS — PRACTICE. — The court, in *habeas corpus* directed to a private individual to produce the body of an infant, is bound to release the infant from improper restraint. *In re Doyle*, 157.

4. —— In such a case the court is not bound to place the child in the custody of any particular person, but will exercise its discretion, looking to the child's interest under all the circumstances. *Id.*

5. —— In determining what the child's interests are the court looks only to its temporal welfare, and disregards all question of religion as affecting its spiritual interests. *Id.*

6. —— In *habeas corpus* the court can not appoint a guardian, but in making a temporary disposition of it, if its temporal interest will be as well conserved by giving it in charge of a person of the religious faith of its parents, it will be so disposed of. *Id.*

HIGHWAYS. See CONSTITUTIONAL LAW, 1.

HOMESTEAD.

1 APPRAISEMENT — MOTION TO QUASH. — Proceedings under a levy and appraisement having been suspended by the sheriff to await the action of the court in proceedings under section 2698 of the homestead act, such appraisement is not conclusive on the defendant, who can show all the facts in the proceeding under said section, and a motion to quash the execution on the ground that the appraisement is erroneous is properly overruled. *Straat* v. *Binkle*, 115.

2. ADMINISTRATOR'S SALE. — Homestead rights can be divested by an administrator's sale under order of the probate court only where the sale is made to pay debts contracted prior to the recording of the deed of the homestead realty. *Daudt* v. *Harmon*, 203.

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HOMESTEAD — Continued.

3. —— EJECTMENT — BURDEN OF PROOF. — In an action of ejectment by the purchaser under such a sale, the burden is on him to show that the debt for the payment of which the sale was made was antecedent to the homestead. *Id.*

4. —— EVIDENCE. — The record of the probate court is the only proper evidence of the fact, and unless it shows that the order of sale was made for an antecedent debt, homestead rights of minors are not affected by the sale. *Id.*

HUSBAND AND WIFE. See STOCKHOLDERS, 1, 2.

1. REDUCTION TO POSSESSION. — The fact that money which is the joint earnings, by labor on a farm, of a husband and wife and her children, is kept in her possession, does not rebut the presumption that the title thereto is in the husband. *Burns* v. *Bangert*, 22.

2. —— Property so under the control of the husband that he may at any time take manual possession of it, is such a reduction to possession as gives him the title. *Id.*

3. —— USES AND TRUSTS. — A husband who, by marriage, acquires the absolute right to personal property in possession, can not, by mere loose talk, be made a trustee of the property for his wife's use. *Id.*

4. —— CRIMINAL LAW — ABANDONMENT — GOOD CAUSE. — A husband whose wife, against his will, frequents houses of prostitution has good cause for refusing to support her. *The State* v. *Staffens*, 558.

5. —— A conviction for wife abandondent can not be sustained under proof which shows the good habits and character of the accused, and that he refused to support his wife because of her notorious acts of unchastity since the marriage. *Id.*

6. —— In such a case it is immaterial that the defendant knew before marriage that the woman was unchaste. *Id.*

INDEMNITY. See REPLEVIN; OFFICERS, 3.

INDICTMENT. See CRIMINAL LAW, 3, 4, 7, 8, 19.

1. FORM OF. — An indictment framed in accordance with the terms of the statute will support a conviction. *The State* v. *Higgins*, 559.

2. SIGNATURE. — An indictment signed by the assistant prosecuting attorney instead of the prosecuting attorney, is sufficient. *Id.*; *The State* v. *Hayes*, 560.

INFANTS. See EQUITY, 1; HABEAS CORPUS, 3.

INJUNCTION. See EQUITY, 8, 9.

1. SALES — APPEALS. — An injunction will not lie to restrain a sale of real estate upon an order of the probate court from which an appeal is pending. *Doellner* v. *Schmieding*, 559.

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INSTRUCTIONS. See CRIMINAL LAW, 1, 2, 25; DAMAGES, 4; NEGLIGENCE, 2; ATTACHMENTS, 18.

1. —— It is error to instruct the jury upon a hypothesis not warranted by the evidence. *Boatmen's Savings Bank* v. *Overall*, 510.

2. DEFENCES — EVIDENCE. — A good affirmative defence being pleaded and supported by evidence, it is error to instruct the jury that they will find for the plaintiff if they believe the state of facts upon which his action is based, without adding the qualification, unless they believe that such affirmative matter of defence has been proved. *Evans* v. *St. Louis, Iron Mountain and Southern Railway Company*, 522.

3. —— PRACTICE. — The error in giving such an instruction is not cured by the giving of a separate correct instruction as to the law governing such defence. *Id.*

4. CONTRACTS — PRACTICE. — The written contract being undisputed, and there being no evidence of any other contract except the evidence of the prior proposition, it is error to submit to the jury the question whether there was more than one contract. *Taylor* v. *Fox*, 527.

5. PRACTICE — INSTRUCTIONS. — An instruction on the whole case must include the evidence of the other party, and if it fails to do so, the court may change it so as to make it apply to the entire case. *Eisenhardt* v. *Cabanné*, 531.

6. —— FALSE TESTIMONY. — An instruction that if the jury believe that any witness has sworn falsely upon any material point they may disregard his entire testimony, omitting the element of wilfulness or knowledge, is erroneous. *Evans* v. *St. Louis, Iron Mountain and Southern Railway Company*, 522; *Fath* v. *Hake*, 537.

7. —— Such an instruction is not harmless where there are two issues, one side of which is supported almost entirely by the evidence of one witness and on either of which a verdict might be rendered. *Fath* v. *Hake*, 537.

8. MISLEADING — PRACTICE. — The giving of erroneous and inconsistent instructions is not sufficient cause for the reversal of a judgment where it is plain that the jury could not have been misled by them to the prejudice of the appellant. *Kelly* v. *Clancey*, 550.

9. —— A judgment will not be reversed on appeal because of a refusal to give an instruction, where all the instructions given are not set out in the record. *Id.*

10. CRIMINAL. — Instructions as to grades of crime as to which there is no evidence are properly refused. — *The State* v. *Wilson*, 550.

11. EVIDENCE. — A failure to instruct the jury as to questions upon which no instructions are asked is not ground for a reversal of the judgment. — *Young* v. *Kellar*, 551.

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INSTRUCTIONS — Continued.

12. PRACTICE. — In a civil case it is the duty of the complaining party to ask fuller instructions where those given are not full and explicit. *Campbell* v. *St. Louis, Iron Mountain and Southern Railway Company*, 553.

13. —— An instruction, if not objectionable as a whole, will not be refused because its first sentence does not embody its entire meaning. *Peabody* v. *Warner*, 556.

INSURANCE.

1. FIRE — RIOT — EXEMPTIONS — EVIDENCE. — Proof that the fire arose from the act of a convict in the penitentiary who, while engaged with others in an attempt to escape, set fire to loose straw which communicated to the insured property, tends to show that the fire arose under a clause in the insurance policy which exempted the insurer from liability for damages from fire occasioned by "any person or persons engaged or concerned in any riot or in notorious resistance to the authority of magistrates or to any other lawful authority." *Strauss* v. *Imperial Fire Insurance Company*, 555.

2. —— INSTRUCTIONS. — In such an action an instruction that "notorious resistance to lawful authority," as used in the policy, means "a resistance of such a magnitude and accompanied with such a show of force as operates for the time being to disrupt prison discipline and free the inmates of such penitentiary, or large numbers of them, and does not mean a resistance to authority on the part of one person, or a few persons, that was readily overcome by the prison officials without loosing their control over the large majority of the inmates of the said prison," is misleading and erroneous. *Id.*

INTEREST. See PARTNERSHIP, 9.

INTERPPLEAS. See FACTOR AND BROKER.

JUDGMENTS AND DECREES. See PRACTICE, APPELLATE, 6, 7; PRACTICE, TRIAL, 6.

1. ASSIGNMENT. — The assignee of a judgment takes the assignor's right to enforce the judgment by supplemental proceedings. *Burns* v. *Bangert*, 22.

2. SCIRE FACIAS — JUDGMENTS. — A proceeding by *scire facias* to revive a judgment is an action, and the judgment therein is a new judgment. *Walsh* v. *Bosse*, 231.

3. PRACTICE — REVIVOR — JUSTICES — EXECUTIONS. — A transcript of the proceedings under which a judgment is revived before a justice, when filed in the circuit court, warrants the issuance of an execution from such court. *Bauer* v. *Miller*, 252.

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JUDGMENTS AND DECREES — Continued.

4. —— An error of the justice in including accrued interest in reviving a judgment, can not be rectified on application to quash the execution issued thereon by the circuit court. *Id.*

5. RECEIVER. — An order appointing a receiver to take charge of property until the further order of the court, is not a final judgment. *Lewis* v. *McCabe*, 398.

6. REVIVOR — SATISFACTION. — Is in no defence to a proceeding to revive a judgment that a constable in whose hands was placed two executions issued upon two judgments in favor of the same plaintiff and against the same defendant, applied the proceeds of the execution here sought to be revived to the satisfaction of the other judgment. *Gempp* v. *Reiss*, 553.

7. —— JOINT JUDGMENTS. — Under such a state of facts, it is immaterial that the judgment sought to be revived was against the defendant and his copartner, while the judgment which was satisfied was against the defendant alone. *Id.*

JURISDICTION. See CRIMINAL LAW, 10.

ACTIONS — WHERE BROUGHT — STATUTE CONSTRUED. — The plaintiff being a resident of one county and one of the defendants a resident of another county while the other defendant is a non-resident of the state, the action is properly brought in the county where the plaintiff resides and the defendants are found. *The State to use* v. *McDougal*, 414.

JURORS.

1. MISCONDUCT OF — EVIDENCE. — Misconduct of a juror can not be established by his own testimony, for the purpose of impeaching a verdict, whether it is alleged to have occurred in or out of the jury room. *Clark* v. *Famous Shoe Company*, 463.

2. EVIDENCE. — A jury can not find the existence of a fact merely because a discredited witness has testified to the non-existence thereof. *Boatmen's Savings Bank* v. *Overall*, 510.

3. CHALLENGE FOR CAUSE. — That a man summoned as one of the venire in the criminal court, said to a person in court at the time that "there is an honest living to be made in this country for every man, and all these thieving sons of bitches ought to be sent up," does not make him subject to challenge for cause, where it does not appear that his remarks were applied to the prisoner on trial. *The State* v. *Burns*, 556.

4. CRIMINAL LAW. — Jurors summoned on a special jury in a criminal case need not be selected by the sheriff of St. Louis from names furnished him by the jury commissioner. *The State* v. *Hayes*, 560.

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JUSTICES OF THE PEACE.

STATEMENT.—A statement before a justice is sufficient if it apprise the defendant of the nature of the action and is sufficiently definite to bar another action. *Von Phul* v. *Menne*, 561.

LANDLORD AND TENANT. See LESSOR.

1. WAIVER.—The tenancy being from month to month, the taking of the tenant's negotiable note for rent in arrears and the acceptance of rent for subsequent months is a waiver of the rights of the summary action under the statute for the arrears of rent. *Horn* v. *Peteler*, 438.

2. NUISANCE—A landlord who renews a letting from month to month of premises upon which is a nuisance, is liable for the damage occasioned to abutting property by such nuisance. *Padberg* v. *Kennerly*, 556.

LANDS AND LAND TITLES.

1. LEGAL REPRESENTATIVES—LEX LOCI.—Under a grant of land by the United State to a person named, "or his legal representative," the question as to who are his representatives must be determined under the law of the State wherein the property is situated. *Cummings* v. *Powell*, 559.

2. ——ADVERSE POSSESSION.—Where adverse possession operates a transfer of title, such possession is as effectual to create a legal representative as is a transfer by deed. *Id.*

3. ——Giving effect to a transfer by adverse possession does not defeat the original grant from the United States, but aids it by ascertaining who is the grantee. *Id.*

LESSOR AND LESSEE.

1. WAIVER—HOLDING OVER.—A holding over by oral agreement after the expiration of a lease, is a holding under the terms of the lease, and is a waiver of the forfeiture of the improvements for a failure to remove them within the time prescribed by the terms of the lease. *Brown* v. *Wolff*, 552.

LICENSES.

1. CITY CHARTER—ORDINANCES—MEAT SHOP—CONSTITUTIONAL LAW.—The city of St. Louis has the power, under its charter, to tax meat-shops. *City of St. Louis* v. *Spiegel*, 210.

2. ——The sale of meat in meat-shops, and the sale of meat in market-houses are not, within the meaning of section 8 of article 10 of the city charter, the same class of subjects. *Id.*

3. ——An ordinance which provides that "the owners of meat-shops who have paid their license may be permitted to deliver meat in a

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LICENSES — Continued.

wagon or otherwise, without taking out an additional license therefor, and in the new limits such owners may send out their wagons in such new limits," does not thereby limit the sale of meat, in the new limits, from wagons, to those whose meat-shops are within the new limits. *Id.*

LIENS. See MECHANIC'S LIENS; CONSTITUTIONAL LAW, 11; EQUITY, 10.

1. WAIVER. — An expressly reserved lien on personalty is not impliedly waived by the giving of credit or the taking of other security. *Montieth* v. *Great Western Printing Company*, 450.

2. —— BAILMENTS — TENDER — REPLEVIN. — A bailor can not take property upon which the bailee has a lien, without tendering the amount due, although the bailee has demanded an excessive amount. *Id.*

3. PRIORITY OF LIENS — FORECLOSURE OF DEED OF TRUST. — The lien of a deed of trust executed prior to the passage of the act of March 21, 1878, is superior to that of a lien for materials furnished for the road after the passage of the act but prior to the expiration of the ninety days, though a portion of the purchase price of the secured bonds was not paid until after the making of the contract for the materials for which the lien is asked. *Andrews* v. *St. Louis Tunnel Railroad Company*.

LIMITATIONS. See SPECIAL TAXES, 11.

1. SCIRE FACIAS — JUDGMENTS. — A judgment in *scire facias* to revive a judgment operates to avoid the statute of limitations, which then runs from its date and not from that of the original judgment. *Walsh* v. *Bosse*, 231.

2. STATUTE OF — ABSENCE FROM THE STATE. — An "absence from the State" such as will, for a considerable period, render it impossible to obtain such a service of process as will support a general judgment, is such an absence as will interrupt the running of the statute of limitations. *Rhodes* v. *Farish*, 430.

3. —— APPELLATE PRACTICE. — The evidence in support of the defence of the statute of limitations being definite, undisputed, and not open to suspicion, an appellate court will direct the proper judgment to be entered by the trial court. *Id.*

LIS PENDENS. See ADMINISTRATION, 9.

MANDAMUS.

1. CONTEMPT. — An error of court in refusing to punish a person guilty of wilful disobedience of its orders, can not be revised under a writ of *mandamus*. *The State ex rel.* v. *Horner*, 191.

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MANDAMUS — Continued.

2. —— *Mandamus* will not be awarded where there is an adequate remedy, by appeal or otherwise, open to the complaining party. *Id.*

3. —— *Mandamus* will not lie to compel the circuit judge to issue its process commanding third persons to obey the decree of the circuit court. *Id.*

MARRIED WOMEN. See EQUITY, 4; STOCKHOLDERS, 1, 2.

MEAT SHOPS. See LICENSES.

MECHANICS' LIENS. See CONSTITUTIONAL LAW, 10, 11.

1. RAILROADS. — Labor and materials provided for in the contract and necessary for the work, may be covered by a mechanic's lien, though they are not actually incorporated in the structure. *Andrews* v. *St. Louis Tunnel Railroad Company*, 299.

2. FIXTURES. — Bolting cloth which is made to form a part of the essential machinery of a flouring mill may, when placed in the mill, be a part of the freehold and subject to a mechanic's lien. *Heidegger* v. *Atlantic Milling Company*, 327.

3. PRIOR INCUMBRANCES — SALES THEREUNDER. — Such a lien will attach only to the improvements where the land has been sold under a prior incumbrance. *Id.*

4. MACHINERY — MORTGAGES — PRIORITY OF LIENS — In so far as machinery furnished for a building of which it becomes a part enters into the completion of an unfinished building, the lien therefor, so far as the building is concerned, takes precedence over a prior mortgage. *Hall* v. *Mullanphy Planing Mill Company*, 454.

5. —— AFTER ACQUIRED PROPERTY. — A mortgage of after acquired property operates only by way of equitable estoppel, and is effective only as against the mortgageor and his privies in contract. It can attach to such property only in the condition in which it comes into the mortgageor's possession, and if the lien of a mechanic has then attached to it, such lien is entitled to priority over the mortgage — *Id.*

MISTAKE.

1. OF FACT — A car conductor who, in leaving a part of his wages with the secretary of a corporation, believing, and having reason to believe, that he is depositing it with the corporation, may recover from the corporation for the money so deposited. *Leary* v. *People's Railway Company*, 561.

2. —— That the conductor, believing that he is taking the notes of the corporation for the money so deposited, being unable to read or write, takes the note of the secretary and treasurer of the corporation, does not release the corporation. *Id.*

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MONOPOLY. See CONSTITUTIONAL LAW.

MORTGAGES AND DEEDS OF TRUST. See EQUITY, 10; CONSTITUTIONAL LAW, 12.

Mortgage of after acquired property. See MECHANIC'S LIENS, 4, 5.

MUNICIPAL CORPORATIONS. See STREETS.

1. POLICE POWER—NUISANCE.—The charter of the city of St. Louis authorizes the regulation of livery stables, the designation of the places where, in future, they may be erected, and the prohibition of their erection at other places. *The State ex rel.* v. *Beattie*, 131.

MURDER. See CRIMINAL LAW.

NEGLIGENCE. See EVIDENCE, 7.

1. CONTRIBUTORY.—A mother who falls into an open hatchway in the sidewalk while endeavoring to prevent her infant child, who had stumbled, from falling into it, is not, as a matter of law, guilty of contributory negligence. *Clark* v. *Famous Shoe Company*, 463.

2. INSTRUCTIONS.—In such a case it is not error to refuse an instruction for a non-suit offered on the ground that there was testimony that the hatchway had been opened by a trespasser. *Id.*

3. CONTRIBUTORY.—The rule that negligence of the plaintiff which contributes directly to cause the injury complained of will prevent his recovery, is without exception or qualification. *Dunkman* v. *Wabash, St. Louis and Pacific Railway Company*, 548.

4. PLEADING.—There can be no recovery upon a general allegation of negligence which gives no notice of facts, but which states only conclusions. *Murdock* v. *Brown*, 549.

5. PLEADING AND PROOF—INSTRUCTIONS.—The allegation being that the injury was occasioned by the falling of an eastern wall, and the proof being conflicting as to whether the plaintiff was injured by a brick from the eastern wall or from a fragment of a southern wall attached to the eastern wall, it is error to instruct the jury that there can be no recovery unless the brick which caused the injury fell from the eastern wall. *Id.*

6. To support a recovery there must be substantial evidence of every material fact necessary to a recovery, and inferences from facts to conclusions must be fair. *Id.*

7. EVIDENCE.—Evidence of the condition of the wall, the falling of which caused the injury, four days before the accident, is competent, where there is no evidence of a change of its condition in the meantime. *Id.*

8. DAMAGES.—The evidence being that at the time of his death the deceased was an active working man, earning a good living for him-

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NEGLIGENCE — Continued.

self and family, a verdict for $1,000, in an action by his wife for damages for his death, will not be reversed, because there was no precise evidence as to the money value of his life. *Id.*

NEGOTIABLE INSTRUMENTS. See WAREHOUSE RECEIPTS.

NEW TRIAL.

1. CRIMINAL LAW — NEWLY DISCOVERED EVIDENCE. — In a criminal case, a motion for a new trial on the ground of newly discovered evidence, which evidence would not tend to show the innocence of the accused, is properly overruled. — *The State Fitzporter*, 282.

2. VERDICT — EVIDENCE. — A new trial should be granted where the verdict is manifestly against the evidence. *Lionberger* v. *Pohlman*, 392; *Taylor* v. *Fox*, 527.

3. NEWLY DISCOVERED EVIDENCE — PRACTICE. — A motion for a new trial on the ground of newly discovered evidence is properly denied if not supported by the defendant's affidavit, or the absence of such affidavit accounted for. *The State* v. *Elliott*, 552.

4. The refusal of the defendant's counsel to summon certain witnesses for the defence is not ground for a new trial. *Id.*

NON-SUIT. See PRACTICE, TRIAL, 18.

NOTICE. See ADMINISTRATION, 9.

1. JUDICIAL NOTICE. — Appellate courts will take judicial notice of the historical facts as to the dates when and the circumstances under which a constitutional change in a county government occurs. *Priest* v. *Lawrence*, 409.

2. INQUIRY. — He who has knowledge of facts sufficient to put him upon inquiry, is chargeable with notice of the facts which inquiry would have disclosed. *Stern Auction Company* v. *Mason*, 473.

NUISANCE. See ORDINANCES, 2.

1. DEFENCES — ORDINANCES. — The passage of an ordinance that no brick kiln shall thereafter be erected within three hundred yards of a dwelling-house, does not authorize the operating of a brick kiln after it becomes a nuisance. *State ex rel.* v. *Board of Health*, 8.

2. —— A legislative authority to carry on the work of operating a brick kiln is not a defence to an action for a nuisance created in carrying on the work. *Id.*

3. —— A brick kiln is not a nuisance *per se*, but may become a nuisance when streets are laid out and dwelling-houses are erected in the immediate vicinity. *Id.*

4. —— It is immaterial that a brick kiln which has become a nuisance was established before there were any dwelling-houses in its vicinity. *Id.*

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NUISANCE — Continued.

5. LANDLORD AND TENANT. — A landlord who renews a letting from month to month of premises upon which is a nuisance, is liable for the damage occasioned to abutting property by such nuisance. *Padberg* v. *Kennerly*, 556.

NUNC PRO TUNC ENTRIES. See PRACTICE, TRIAL COURTS, 1.

OFFICERS. See GARNISHMENT.

1. SUSPENSION FROM OFFICE. — The suspension from office of an officer by the tribunal before whom he is to be tried, pending his trial in due form upon charges a conviction of which would involve his dismissal from office, is not an arbitrary or improper exercise of authority. *State ex rel.* v. *Police Commissioners*, 48.

2. —— PROHIBITION — UNREASONABLE DELAY. — That the order of suspension intimates that the hearing of the charges will be postponed until a decision is reached in a matter pending and which involves the nature and limitation of the jurisdiction of the tribunal over the officer, furnishes no ground for prohibition of the suspension or of the filling of the office pending the suspension. *Id.*

3. SHERIFF — ATTACHMENT — INDEMNITY BONDS — DAMAGES — TRESPASS. — A sheriff who, under a writ of attachment seizes personalty which is claimed and a bond given under the act of 1855, and which is sold by order of court pending the attachment suit which, on trial, is dissolved, is not liable to the claimant for damages in trespass. The remedy is an action on the indemnity bond. *Paddock-Hawley Iron Company* v. *Mason*, 320.

4. DE FACTO OFFICERS — SCHEME AND CHARTER — RECORDER OF DEEDS. — During the interval between the election which resulted in the separation of the county from the city of St. Louis and the judicial ascertainment and official promulgation of that result, the recorder of deeds for St. Louis County remained the *de jure* recorder for both the city and the county. *Priest* v. *Lawrence*, 409.

OPTIONS. See CONTRACTS, 11.

ORDINANCES. See LICENSES; CONSTITUTIONAL LAW.

1. CONSTRUCTION OF. — An ordinance granting a right to lay pipes in the public streets must be strictly construed, and its purposes can not be enlarged by construction. *St. Louis Gas-Light Company* v. *St. Louis Gas, Fuel and Power Company*, 52.

2. NUISANCE. — An ordinance prohibiting the erection of a livery stable on any block of the city without the consent of the owners of one-half of the ground in any such block, is not an unreasonable exercise of the charter power. *The State ex rel.* v. *Beattie*, 131.

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PARENT AND CHILD. See EQUITY, 3.

PARTNERSHIP.

1. EQUITY. — A proceeding for the settlement of partnership affairs between the copartners and between the firm and its creditors is a proceeding in equity. *Holt* v. *Simmons*, 97.

2. TRADING FIRMS — IMPLIED POWERS — COMMERCIAL PAPER. — A manufacturing partnership firm which buys and sells is a trading firm, and one partner has the implied power to borrow money on the firm credit and to issue commercial paper therefor, in the firm name. *Id.*

3. —— He who has knowledge that one partner has executed a firm note with the consent of his copartner, may assume that such partner has the power to execute and negotiate commercial paper in the firm name. *Id.*

4. —— NOTICE. — Commercial paper issued for value in the firm name, after the firm's dissolution, by one party without the other's consent, is good, in the hands of the payee who had no notice, actual or constructive, of such dissolution. *Id.*

5. —— MORTGAGE — PLEDGE. — In the absence of fraud of the mortgagee or pledgee a partner may bind the partnership by the pledge or mortgage of firm personalty for business purposes of the firm and within the scope of the partnership business. *Id.*

6. —— AGENCY. — In pledging or mortgaging firm personalty, for firm purposes and within the scope of the business by one partner, he is presumed to act as the agent of his copartner with respect of the latter's share of interest. *Id.*

7. CHATTELS. — Personal property purchased by one partner with his own funds to be used for partnership purposes, as between the partners remains the property of the purchaser, in the absence of any understanding to the contrary. *Kelly* v. *Clancey*, 550.

8. —— If such property be destroyed in the use of the partnership and replaced by other, the latter belong to the partner who owned the original property. *Id.*

9. INTEREST. — The statute which makes six per cent the legal rate of interest in the absence of a written agreement has no application to a partnership agreement whereby one partner is allowed ten per cent for carrying securities purchased on joint account. *Campbell* v. *Coquard*, 552.

10. —— PRACTICE — COSTS. — In a suit for a partnership accounting, where the defendant admits an indebtedness, but denies the amount, and where the plaintiff makes proof as to some items and the defendant as to others, the court may, under the statute, apportion the costs. *Id.*

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PLEADING. See DAMAGES, 1; REPLEVIN, 7, 8; ATTACHMENT, 2; NEGLIGENCE, 4.

1. EQUITY — MULTIFARIOUSNESS. — A bill in equity is not multifarious unless distinct and independent matters are united therein. *Lindley* v. *Russell*, 217.

2. —— CONDITIONS PRECEDENT. — The performance of conditions precedent must be pleaded. *City of St. Louis* v. *Cruikshank*, 495.

3. —— ACCOUNT STATED. — In an action on an account stated, the defendant's assent to the settlement or balance stated must be averred. *Van Blarcom* v. *Donovan*, 535.

4. —— PRACTICE — PAPERS FILED WITH PLEADINGS. — It is sufficient if the tax-bills sued on are filed with the amended petition. *The State ex rel.* v. *Miller*, 539.

POLICE POWER. See MUNICIPAL CORPORATIONS, 1.

PRACTICE. See CONTEMPT; JUDGMENTS, 3, 4; NEW TRIAL, 7, 8; EVIDENCE, 5; ATTACHMENT, 3; ACTIONS, 2; INSTRUCTIONS.

1. CONTRACTS. — In an action to recover money held as security for the faithful performance of a special contract, the plaintiff must show full performance of the contract on his part or a waiver by the defendant. *Fox* v. *Pullman Palace Car Company*, 122.

2. —— PLEADING — ACTIONS. — In an action for money had and received, where the defendant sets up a special contract for the faithful performance of which the money is held, and alleges breaches thereof, and the cause is tried upon issues made as to the latter allegation, that the action was brought for money had and received is not ground for the reversal of the judgment. *Id.*

3. CRIMINAL. — In a criminal action for an attempt to commit an offence, the court will not, on appeal, reverse the judgment on the ground that the offense was actually committed, unless the evidence thereof is clear and unequivocal. *The State* v. *Fitzporter*, 282.

4. ORDINANCES — EVIDENCE. — An objection to the introduction in evidence of an ordinance, on the ground that the subject is not clearly expressed in its title, can not be made for the first time on appeal. *Dunkman* v. *Wabash, St. Louis & Pacific Railway Company*, 548.

5. —— Such an objection is waived if not made at the trial. *Id.*

6. EVIDENCE. — Where there is evidence of a fact, it is immaterial, on appeal, that the witness thereto may seem to the appellate court to be unworthy of credit. *Murdock* v. *Brown*, 549.

7. TRIAL JUDGE. — A statement to counsel by a trial judge, made in the presence of a jury, after the submission of the cause, that "there is no mistake about this date, July 16, being the correct date from

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PRACTICE — Continued.

which to compute interest if the verdict is for the plaintiff," is not ground for a reversal, where the jury were instructed to pay no attention to the remark. *The State ex rel.* v. *Groschke*, 557.

PRACTICE, APPELLATE COURT. — See REFORMS, 1, 2.

1. CRIMINAL LAW. — A criminal conviction not supported by substantial evidence will be reversed on appeal. *The State* v. *Kennedy*, 287.

2. STIPULATION. — An appellate court will not enter judgment in a criminal case upon a stipulation not signed by the proper officer of the state. *The State* v. *Fitzporter*, 282.

3. WEIGHT OF EVIDENCE. — A judgment which has not substantial evidence to support it will be reversed on appeal. *Hamlin* v. *Carruthers*, 561; *Lionberger* v. *Pohlman*, 392.

4. —— The evidence in support of the plaintiff's petition being sufficient to make out his case, unimpeached, and unattended by any circumstances tending to cast suspicion on it, and there being no substantial countervailing evidence, a verdict for the defendant will be set aside on appeal. *Id.*

5. The evidence in support of the defence of the statute of limitations being definite, undisputed, and not open to suspicion, an appellate court will direct the proper judgment to be entered by the trial court. *Rhodes* v. *Farish*, 430.

6. JUDGMENT — VERDICT. — In reversing a judgment entered upon a special verdict which is responsive to the issues, an appellate court can not enter an original judgment on the special verdict, but must remand the cause. *Hall* v. *Mullanphy Planing Mill Company*, 454.

7. —— Appellate courts can vacate judgments entered in common-law and statutory causes, for legal errors only. *Id.*

8. EVIDENCE. — The introduction of improper evidence which can not, under the circumstances of the case, prejudice the appellant, is not ground for a reversal. *Stern Auction Company* v. *Mason*, 473.

9. EXCESSIVE VERDICT — REMITTITUR. — An appellate court may, where the damage is excessive, reverse the judgment for that cause, unless the respondent will, by stipulation, remit the amount of the excess. *The State to use* v. *McHale*, 478.

10. EXCEPTIONS. — No error appearing on the record proper, the judgment will be affirmed, when no bill of exceptions is filed. *The State* v. *Herzog*, 547.

11. CRIMINAL CASES. — In criminal actions, where no statement and brief are filed, the court will, on appeal, render judgment upon the record. *The State* v. *Zimmerman*, 547.

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PRACTICE, APPELLATE COURT—Continued.

12. INSTRUCTIONS.—A judgment will not be reversed on appeal because of a refusal to give an instruction, where all the instructions given are not set out in the record. *Kelly* v. *Clancey*, 550.

13. EVIDENCE.—An appellate court will not reverse a judgment because the trial court, sitting without a jury, finds that the evidence does not show that the contract sued on had been subsequently discharged. *Edgar* v. *Chicago, Burlington & Quincy Railroad Company*, 551.

14. COSTS—DISCRETION.—An appellate court will not review the trial court's discretion in dividing the costs between litigants, unlets such discretionary power has been abused. *Campbell* v. *Coquard*, 552.

15. ——On appeal by both parties from a judgment in which the costs are apportioned, where the judgment is affirmed, the costs of the appeal will be apportioned between the parties. *Id.*

PRACTICE, TRIAL COURTS.

1. NUNC PRO TUNC ENRTIES—BILLS OF EXCEPTIONS.—A *nunc pro tunc* entry of the allowance of a bill of exceptions can not be made at a subsequent term where no paper or memorandum in the cause shows the facts. *Cunningham* v. *Wells*, 78.

2. MOTIONS.—A clearly frivolous motion may be overruled immediately, notwithstanding the statute which requires that motions shall be filed at least one day before they are determined. *Vallé* v. *Picton*, 158.

3. ——ATTORNEY AND CLIENT.—An affidavit in support of a motion to dismiss on the ground of want of authority in the attorney to begin the suit, which states only the affiant's belief, does not tend to overcome the presumption arising from the professional obligation of the attorney, and such motion may be summarily overruled. *Id.*

4. ATTORNEY'S MISCONDUCT.—Objections that the prosecuting attorney was unfair in his closing address to the jury will not be considered on appeal unless objection thereto was made at the trial. *The State* v. *McChesney*, 259.

5. AMENDMENT—VERDICT.—The trial court may, at any time, from competent evidence, amend a verdict so as to make it express the manifest intention of the jury. *Acton* v. *Dooley*, 441.

6. SPECIAL VERDICT—JUDGMENT.—A special verdict of a jury which is responsive to the issue, is conclusive upon the court until it is set aside, and the court can not ignore such a verdict, make a different finding, and enter a judgment thereon. *Hall* v. *Mullanphy Planing Mill Company*, 454.

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PRACTICE, TRIAL COURTS — Continued

7. ATTACHMENT — ACTION ON BOND — FORM OF VERDICT.— In an action on an attachment bond, where several items of damage are alleged, the jury in their verdict properly specify the damages under each allegation. *The State to use* v. *McHale*, 478.

8. ——A refusal to receive such a verdict is not ground for reversal, where the jury immediately return a verdict for the aggregate amount of their first findings. *Id.*

9. NEW TRIAL. — A new trial should be granted by the trial court where the verdict is manifestly against the weight and the entire current of the testimony. *Lionberger* v. *Pohlman*, 392; *Taylor* v. *Fox*, 527.

10. VERDICT. — Under a separate finding for the plaintiff on all the grounds alleged, the verdict will not be disturbed if the finding as to some of the grounds is fully sustained by the evidence. *Eisenhardt* v. *Cabanne*, 531.

11. PLEADING AND PROOF. — The plaintiff is not required to prove facts which are explicitly admitted by the defendant's answer. *Campbell* v. *St. Louis, Iron Mountain and Southern Railway Company*, 553.

12. INSTRUCTIONS. — In a civil case it is the duty of the complaining party to ask fuller instructions where those given are not full and explicit. *Id.*

13. NON-SUIT — COUNTER-CLAIM. — The taking of a non-suit by the plaintiff will prevent a recovery in that action by the defendant on his counter-claim, although he have judgment by default. *O'Malley* v. *Judy*, 553.

14. EVIDENCE — INSTRUCTIONS. — The admission of evidence competent for one, and incompetent for another, purpose should be guarded by instructions. *Peabody* v. *Warner*, 556.

15. CONTRACT. — In an action on a contract to impart to a competent person the information necessary to enable him to operate a sugar factory, it is for the jury to say under the evidence whether such a competent person should be an expert, and whether a competent person within the meaning of the contract has been designated to receive the information bargained for. *Tansill* v. *Brinkman*, 557.

PRINCIPAL AND AGENT. See AGENCY.

PRIVILEGES. See CONSTITUTIONAL LAW.

PROHIBITION. See OFFICERS, 2.

RAILROADS. See DAMAGES, 1, 2; MECHANICS' LIENS, 1; CONSTITUTIONAL LAW, 11, 12.

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RECORD.

1. —— EVIDENCE — JUDGE'S MEMORANDUM. — The judge's memorandum on his trial docket is not a part of the record, and can not, at a subsequent term, be used to contradict the record entry of the judgment, which is conclusive. *Henley* v. *Kinley*, 176.

REFEREES.

1. PARTNERSHIP — PRACTICE. — The findings of fact of a referee upon the claims of firm creditors in a partnership settlement proceeding are subject to review, both by the trial court and by the appellate court. — *Holt* v. *Simmons*, 97.

2. EQUITY — PRACTICE. — In equity proceedings the appellate court will review the findings of the referee where the evidence is embodied in the record. *Prendergast* v. *Eyermann*, 387.

REPLEVIN. See BAR TO ACTIONS, 5.

1. EXECUTION — INDEMNITY BONDS — SHERIFFS — CLAIMS OF THIRD PERSONS. — A claim made by one whose property has been levied upon under an execution against another, which will deprive the claimant of the right to replevy the property and confine him to his remedy on the bond, must be made in conformity to the statute. — *St. Louis Dairy Company* v. *Sauer*, 1.

2. —— The claimant will not be deprived of his right to replevy his property unless the officer shall have taken a good indemnification bond. *Id.*

3. —— An indemnity bond, taken under the act of March 3, 1855, if not taken in the name of the state, will not protect the officer, nor establish his defence in an action of replevin for goods seized by him. *Id.*

4. —— The amendment of that act, passed March 3, 1859, does not repeal the original provisions of the act as to the conditions of the bond, nor the provision that the bond shall be made payable to the state. *Id.*

5. —— AFFIDAVIT. — The affidavit required by statute, in replevin may be made by another on behalf of the plaintiff. *Johnson* v. *Mason*, 271.

6. BAILMENTS — TENDER — LIENS. — A bailor can not take property upon which the bailee has a lien without tendering the amount due. *Monteith* v. *Great Western Printing Company*, 450.

7. —— PLEADING AND PRACTICE — EVIDENCE. — In an action of replevin any fact which tends directly to disprove right of possession in the plaintiff may be shown under a general denial. *Stern Auction Company* v. *Mason*, 473.

8. —— FRAUDULENT CONVEYANCES. — In such an action, fraud in the acquisition of the plaintiff's title may be proved by the defendant under the general denial. *Id.*

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RES JUDICATA. See EVIDENCE, 2; SPECIAL TAXES, 10.

1. NUISANCE.—A prosecution for a violation of a city ordinance in erecting a brick kiln within three hundred feet of a residence, does not involve the question of a nuisance and does not make the question *res judicata* as to the city. *The State ex rel.* v. *Board of Health*, 8.

SALES. See HOMESTEAD, 2; VENDOR; EQUITY, 12.

1. —— ACTIONS—PRIVILEGES.—An auction sale of one lot of real estate with the privilege in the purchaser to take an additional lot is, when the purchaser exercises that privilege, a separate sale of each lot. *McManus* v. *Gregory*, 375.

2. —— VENDOR'S OPTION OF REDEMPTION—BONUS—CONTRACTS.—Under a provision, in a contract of sale at auction, that the vendor might redeem the property sold by paying a *bonus* of from seven to thirty dollars, the purchaser may demand the larger sum as a condition of redemption. *Id.*

SCIRE FACIAS. See JUDGMENTS.

1. JUDGMENTS.—A proceeding by *scire facias* to revive a judgment is an action, and the judgment therein is a new judgment. *Walsh* v. *Bosse*, 231.

2. —— LIMITATIONS.—A judgment in *scire facias* to revive a judgment operates to avoid the statute of limitations, which then runs from its date, and not from that of the original judgment. *Id.*

SET-OF. See ATTACHMENTS, 1.

SPECIAL TAXES.

1. STREETS—REPAIRS—CONSTRUCTION.—Abutting property owners who constructed streets before the extension of the limits of the city of St. Louis are not liable for the repairs of such streets after the city limits are extended to include them, on the theory that such repairs constitute a construction of the streets. *O'Meara* v. *Green*, 118.

2. —— Special tax bills issued for such work and which designate the work as construction work, are not conclusive as to the character of the work for which they were issued. *Id.*

3. —— In a suit on a special tax bill, the question as to whether the work done was that usually done by the city under the head of repairs, or was wholly or in part an original construction of the street, is for the jury. *Id.*

4. —— Under the charter of the city of St. Louis, the cost of the construction of streets is chargeable against abutting property holders, and the cost of repairing the streets must be paid by the city. *Id.*

5. —— STREET RECONSTRUCTION—CROSS-WALKS.—A special tax bill for reconstructing a street may include charges for the spaces

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SPECIAL TAXES — Continued.

usually occupied by cross-walks, where the ordinance under which the work is done does not require that cross-walks shall be made. *Gibson* v. *Kayser*, 404.

6. —— STREET INTERSECTIONS. — Such a special tax bill may include charges for work extending to the middle line of the cross streets at each end of a block. *Id.*

7. —— CURBING. — Such a special tax bill may include charges for curbing, not done in front of the particular lot against which the bill is made out, but done on other lots abutting on the improved streets, the assessment being made *pro rata* against all the lots abutting on the street. *Id.*

8. —— GRADING. — In reconstructing a graded street, excavations which are necessary to prepare the street for laying the new paving material do not constitute "grading" within the meaning of the charter provision which makes the cost of grading a charge against the city. *Id.*

9. —— IRREGULAR BILLS. — Under the St. Louis charter of 1870, a special tax bill was not void because not made out in the name of the real owner of the property sought to be charged, or because made out in the name of a deceased person. *Eyermann* v. *Scollay*, 498.

10. —— RES JUDICATA. — A judgment in favor, of the defendants on a special tax bill which is irregular, but not void, is a bar to a subsequent action by the same plaintiff against the same defendant on an amended tax bill for the same work. *Id.*

11. —— LIMITATIONS — AMENDMENTS. — In an action on a special tax bill against a man who was dead, his heirs can not, after a right of action against them has become barred, be brought into the action by issuing amended tax bills, and amending the petition so as to make them parties to the action. *Id.*

12. ALLEYS. — A lot which abuts on an alley connecting with the newly constructed alley so as to give the owner an outlet through it, does not make the alley the same so as to render the owner of the lot liable on a special tax bill for the improvement. *City of St. Louis* v. *Juppier*, 557.

SPECIFIC PERFORMANCE.

1. CONTRACTS — TENDER. — In an action for the specific performance of a contract to convey real estate, where the defence is a denial of the contract, a tender of the purchase-money is unnecessary. *McManus* v. *Gregory*, 375.

STOCK. See DAMAGES, 1, 2.

STOCKHOLDERS.

1. MARRIED WOMEN. — Under the statute of 1865 a married woman

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STOCKHOLDERS — Continued.

might become a stockholder with all the liabilities thereof for unpaid stock. *Simmons* v. *Dent*, 288.

2. HUSBAND AND WIFE.—A husband who, in good faith, assigns to his wife, who is capable of taking, his stock in a solvent corporation, is relieved from a stockholder's liability. *Id.*

STREETS. See CONSTITUTIONAL LAW; ORDINANCES 1; SPECIAL TAXES.

1. MUNICIPAL CORPORATIONS — PLEADING — CONDITIONS PRECEDENT.— In proceedings to open an alley founded on an ordinance which provides that it shall be void unless the owners of a certain described strip of land shall dedicate it for alley purposes within a given time, the petition must aver such dedication under the terms of the ordinance. *City of St. Louis* v. *Cruikshank*, 495.

2. —— STREET OPENING — ASSESSMENT OF BENEFITS — EXCEPTIONS TO REPORT. — The owner of property against which benefits are assessed for the opening of a street may except to the commissioner's report on the ground that the ordinance upon which the proceeding is founded is invalid. *Id.*

TAXES. See LICENSES.

1. EXEMPTIONS — CONSTRUCTION OF GRANTS — Grants of exemption from taxation must be strictly construed, and the grantee can take nothing by intendment or implication. *The State ex rel.* v. *Lange*, 468.

2. —— CEMETERIES. — A charter exemption of property from taxation "so long as the same shall remain dedicated to the purposes of a cemetery," can not be made to include a lot of ground which is rented out to a third person who uses it as a residence and for purposes of husbandry. *Id.*

3. BACK TAXES — EVIDENCE — A tax bill can not be excluded, in an action for back taxes, because it is signed by a deputy collector. *The State ex rel.* v. *Miller*, 539.

4. —— In such an action it is competent to show that the person who signed the tax bill as deputy collector was in fact a deputy collector. *Id.*

5. —— PARTIES. — It is not necessary to make parties to such an action persons who have acquired interests in the land subsequently to the assessment of taxes. *Id.*

TRADE-NAMES.

TRADE-MARK — PROPRIETARY RIGHT TO A TRADE-NAME. — A dentist doing business in St. Louis may acquire a proprietary right to the use of the words "New York Dental Rooms," to describe his place of business. *Sanders* v. *Utt*, 322.

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TRESPASS. See DAMAGES, 3; OFFICERS, 3.

TRUSTEES.

1. EQUITY — TRANSIENT SECURITIES. — A trustee who is required by the instrument which creates the trust to hold the capital for the remainder-man, has an implied power to convert a transient security into money for the purpose of a permanent investment. *Mason* v. *Bank of Commerce*, 275.

2. —— A promissory which note will mature in less than one year is a transient security. *Id.*

3. —— A purchaser in good faith of such a note from the trustee takes the title thereto, and is not bound by the act of the trustee with reference to the purchase-money paid. *Id.*

USES AND TRUSTS. See HUSBAND AND WIFE, 3.

VENDOR AND VENDEE. See SALES.

1. DUTIES OF VENDEE WHEN MORE GOODS ARE SENT THAN ARE ORDERED. — The purchaser of goods to whom the seller sends more goods than are ordered is under no legal obligation to receive any part of the goods, nor to return them at his own expense. *Landesman* v. *Gumersell*, 459.

2. VOLUNTARY BAILMENTS — MISFEASANCE — MEASURE OF DAMAGES.— If the purchaser voluntarily attempts to return the goods, and by his mistake they are delayed on the road, he is liable only for the loss necessarily occasioned by the negligent execution of the voluntary bailment. *Id.*

VENUE.

1. EVIDENCE — PRACTICE. — The venue being laid at St. Lonis, proof that the offence was committed on a certain street is sufficient to support a finding that the offence was committed at St. Louis.— *The State* v. *Fitzporter*, 282.

VERDICT — See PRACTICE APPELLATE, 6, 7; PRACTICE TRIAL, 5, 6, 7, 10.

1. AMENDMENT. — A verdict may be amended at any time so as to make it express the manifest intention of the jury.—*Acton* v. *Dooley*, 441.

WAGERS. See CONTRACTS.

WAREHOUSE RECEIPTS.

A shipping ticket is not a warehouse receipt, and is non-negotiable.— *Union Savings Association* v. *St. Louis Grain Elevator Company*, 560.

WASTE. See ADMINISTRATION, 6.

Ex. G. A. A.

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